Public Prosecutor v Abdul Razak bin Dalek

HIGH COURT (MUAR) — CRIMINAL TRIAL NO 45–11 OF 2002
JEFFREY TAN J
25 AUGUST 2006

Criminal Law — Penal Code, s 302 — Murder — Whether prima facie case established — Whether sudden and grave provocation made out — Penal Code ss 300, 302

The accused was charged with the murder of his estranged wife ('the deceased') — an offence punishable under s 302 of the Penal Code. The facts showed that the deceased was stabbed and had her throat slit. Death was caused by an incised wound to the neck of the deceased that severed the carotid artery. No one saw the attack upon the deceased. However, the accused was with the deceased just moments before. He was seen holding the murder weapon — a knife (P8A) — later found covered with the blood of the deceased. His clothes were also stained with blood. The prosecution contended that the accused stabbed and slit the throat of the deceased who had returned to the matrimonial home to visit their sick child. The accused, upon being asked to enter his defence, pleaded grave and sudden provocation under Exception 1 to s 300 of the Penal Code.

Held, convicting the accused as charged and sentencing him to death:

(1) The unchallenged evidence established conclusively that the accused was found holding a knife bearing the blood of the deceased at the very place she would have been attacked just moments earlier. Given the proximity in time and place between the attack on the deceased and the accused found holding a knife bearing the blood of the deceased and putting all things together, there could be only one conclusion. The accused was found with the smoking gun. The accused was the assailant, a fact affirmed by the attempts of the accused to inflict self-injury — conduct not consistent with innocence; and by the fact that P8A was the weapon — a fact affirmed by the DNA results. Given the unchallenged facts of the case, there was no possibility that the accused was not the assailant or that P8A was not the weapon (see para 50).

(2) The maximum evaluation of the evidence showed that all ingredients of the charge had been proved beyond all doubt. Unless rebutted, the prosecution had adduced evidence that was sufficient for a belief in the existence of the facts stated in the charge. The prosecution had adduced evidence that was sufficient for a conviction should the accused have remained silent. The prosecution had indeed made out a prima facie case (see para 63).

(3) On the facts and circumstances, there was no grave and sudden provocation that would have destroyed the capacity for reasoning and inspired the intention

in a reasonable man to kill. The retaliation was totally out of proportion to the aggravation. In all fairness, the accused could have had his reason to be angry with the deceased, but the denial of conjugal rights was no reason to kill. Exception 1 was not proved. Doubt was not cast. On the contrary, the offence had been proved beyond all reasonable doubt. There was no doubt whatsoever that the accused murdered the deceased. All evaluation of the evidence produced only that result (see paras 102–103).

[Bahasa Malaysia summary

Tertuduh dituduh membunuh bekas isterinya ('si mati') — satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan. Fakta-fakta menunjukkan yang bahawa si mati telah ditikam dan lehernya dikelar. Kematian disebabkan oleh luka insisi di leher si mati yang telah memotong arteri carotid. Tiada sesiapa yang melihat serangan ke atas si mati. Tetapi, tertuduh ada bersama si mati sejurus sebelum kejadian tersebut. Beliau telah dilihat memegang senjata yang digunakan untuk membunuh — sebilah pisau (P8A) — yang kemudiannya dijumpai berlumuran dengan darah si mati. Pakaiannya juga berlumuran darah. Pendakwa raya mengatakan bahawa tertuduh telah menikam dan mengelar leher si mati yang baru sahaja pulang ke rumah kelamin mereka untuk melawat anak mereka yang sakit. Tertuduh, semasa disuruh memasukkan pembelaan, memohon bangkitan marah yang dahsyat dan mengejutkan di bawah Pengecualian 1 kepada s 300 Kanun Keseksaan.

Diputuskan, mensabitkan tertuduh sebagaimana pertuduhan dan memberikan hukuman bunuh:

(1) Keterangan yang tidak dipertikaikan membuktikan secara kukuh yang tertuduh didapati memegang sebilah pisau yang berlumuran dengan darah si mati pada tempat si mati mungkin diserang terdahulu dari itu. Memandangkan kedudukan masa dan tempat di antara serangan ke atas si mati dan tertuduh dijumpai memegang pisau yang berlumuran dengan darah si mati dan meletakkan kesemua itu bersama, hanya satu kesimpulan dapat dibuat. Tertuduh dijumpai dengan 'pistol yang berasap'. Tertuduh merupakan penyerang, satu fakta yang disahkan oleh percubaan-percubaan tertuduh untuk melakukan kecederaan ke atas diri sendiri — perbuatan yang tidak selari jika tidak bersalah; dan melalui fakta yang P8A adalah senjata — satu fakta yang disahkan oleh keputusan DNA. Memandangkan fakta-fakta yang tidak dipertikaikan dalam kes ini, tiada terdapat kebarangkalian yang tertuduh bukannya penyerang atau bahawa P8A bukanlah senjata (lihat perenggan 50).

(2) Penilaian maksima keterangan menunjukkan bahawa kesemua ciri-ciri pertuduhan telah dibuktikan melepasi kesemua keraguan. Jika hanya bila disangkal, pendakwa raya telah mengemukakan keterangan yang mencukupi mengenai kewujudan fakta-fakta yang dinyatakan dalam pertuduhan. Pendakwa raya telah mengemukakan keterangan yang mencukupi untuk sabitan jika tertuduh memilih untuk berdiam diri. Pendakwaraya telah sesungguhnya mengemukakan satu kes prima facie (lihat perenggan 63).

(3) Pada fakta-fakta dan keadaan-keadaan, tidak terdapat bangkitan marah yang dahsyat dan mengejutkan yang boleh memudaratkan keupayaan berfikir dan memberi dorongan kepada orang yang waras untuk membunuh. Tindak balas tersebut adalah tidak berbaloi dengan serangan. Untuk berlaku adil, tertuduh mungkin mempunyai sebab untuk marah dengan si mati, tetapi penafian hak kelamin bukanlah satu sebab untuk membunuh. Pengecualian 1 tidak dibuktikan. Keraguan tidak dibangkitkan. Sebaliknya, kesalahan tersebut telah dibuktikan melepasi segala keraguan yang munasabah. Tiada sebarang keraguan yang tertuduh telah membunuh si mati. Kesemua penilaian keterangan telah membuktikan keputusan tersebut (lihat perenggan 102–103).]

Notes

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1131–1132.

Cases referred to

Bala Anak Matik v PP [2006] 3 MLJ 516 (refd)
Balachandran v PP [2005] 2 MLJ 301 (refd)
Che Omar bin Mohd Akhir v PP [1999] 2 MLJ 689 (refd)
Chong Teng v PP [1960] MLJ 153 (refd)
Dato' Mokhtar bin Hashim & Anor v Public Prosecutor [1983] 2 MLJ 232 (refd)
Hashim bin Mat Isa v PP [1950] MLJ 94 (refd)
Idu Beg [1881] 3 All 776 (refd)
Ikau Anak Mail v PP [1973] 2 MLJ 153 (refd)
Juraimi bin Husin v PP [1998] 1 MLJ 537 (refd)
Khoo Hi Chiang v PP [1994] 1 MLJ 265 (refd)
Kishore Singh AIR 1977 SC 2267 (refd)
Lai Kim Hon & Ors v PP [1981] 1 MLJ 84 (refd)
Lee Fah Sang v PP [1967] 2 MLJ 163 (refd)
Lim Heng Soon & Anor v PP [1970] 1 MLJ 166 (refd)
Lim Lian Chen v PP [1992] 1 CLJ 285 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65 (refd)
Lorensus Tukan v PP [1988] 1 MLJ 251 (refd)
Mancini v Director of Public Prosecutions [1941] 3 All ER 272 (refd)
Ng Eng Kooi & Anor v PP [1970] 1 MLJ 267 (refd)
PP v Awang Raduan Awang Bol [2005] 1 CLJ 649 (refd)
PP v Awang Raduan bin Awang Bol [1998] 5 MLJ 460 (refd)
PP v Kenneth Fook Mun Lee (No 2) [2003] 3 MLJ 581 (refd)
PP v Lasakke [1964] MLJ 56 (refd)
PP v Lim Eng Kiat [1995] 1 MLJ 625 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393 (refd)
Pasadi Verabbayi v State of Andhra Pradesh 1984 Cri LJ 440 (refd)
R v Upendra 19 CWN 653 (refd)
Sainal Abidin bin Mading v PP [1999] 4 MLJ 497 (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174 (refd)
Vijayan v PP [1975] 2 MLJ 8; [1975–1977] 1 SLR 100 (refd)
Virsa Singh v State of Punjab AIR 1958 SC 465 (refd)

Legislation referred to

Criminal Procedure Code s 180(i)
Evidence Act 1950 s 105
Penal Code ss 299, 300, 302, 304, exception 1

Haslinda bte Abu Bakar (Deputy Public Prosecutor, Attorney-General's Chambers) for the prosecution.
K Balaguru (Hj Mohd Khalil bin Hj Abd Ghani with him) (Khalil & Co) for the accused.

Jeffrey Tan J:

[1] The charge against the accused reads as follows:

> Bahawa kamu pada 3 September 2001 jam lebih kurang 8.00 pagi hingga 8.30 pagi di rumah tidak bernombor T/L 351, Kampong Parit Pecah, Parit Jawa, di dalam daerah Muar, di dalam Negeri Johor Darul Takzim, dengan niat telah melakukan kesalahan bunuh hingga menyebabkan kematian Rozita Binte Haron k/p 640604-01-5496, oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun keseksaan.

[2] 14 witnesses testified for the prosecution. But only SP8 and SP11 (sister-in-law and elder brother of the accused) were at the immediate scene at the material time of the alleged offence. Stated briefly, it was the prosecution story that the accused stabbed and slit the throat of his estranged wife, Rozita bte Haron ('Rozita'), who had returned, just moments earlier, to their erstwhile matrimonial home to visit their younger son who was down with fever.

[3] SP8 (Rokiah bte Dawi) testified that the accused is the younger brother of her husband (SP11). The accused has two children, namely Mohd Zainuddin and Mohd Rafiz. Rozita, the woman in photographs P25(1 & 2), was the wife of the accused. Rozita died in her house — T/L 351, Kampong Parit Pecah, Parit Jawa, Muar, Johor Darul Takzim — on 3 September 2001. The house of the accused was about 10 feet from her house. Sometime between 7am to 8am on 3 September 2001, she informed her husband (SP11) that Rozita had come to see Mohd Rafiz. On 3 September 2001, Rozita was no longer living with the accused. Rozita left the accused in June of that year. She asked Rozita why she (Rozita) did not attend the wedding of her (SP8) child on 2 September 2001. Rozita replied that she could not make it. About 5–10 minutes after Rozita had arrived (see p 16 of the notes of proceedings — NP), the accused came over to her house. She and Rozita were then in the kitchen of her house. She went to the bangsal (a marquee-like structure outside her house) to take some food (nasi minyak) for Rozita. As she re-entered her kitchen from the bangsal, she heard the accused saying in a normal tone to Rozita, 'abang pegang Ita pun tak boleh ke? Ita kan masih isteri abang' (see page 16NP read together with 21NP). The accused and Rozita were then by the side of her kitchen door. No other persons were present. 'Ita adalah panggilan biasa untuk Rozita.' She placed the food on the stove. She went to the toilet outside her house. The accused and Rozita were still by the side of her kitchen door. She re-entered her kitchen. The accused and Rozita were

still by the side of her kitchen door. As she was heating up the food, she felt Rozita patting her rear right shoulder. Rozita loudly cried 'Kak Kiah', her moniker. She turned. Her (SP8) clothing was wet. There was blood on Rozita and blood at the place where Rozita had stood, that is, by the kitchen door. Rozita could still walk. Then Rozita collapsed onto the floor. Rozita bleed at the place where she collapsed. The accused was beside the kitchen wall when Rozita patted her on her shoulder. 'Saya tidak perasan samada OKT memegang apa-apa.' There was blood on Rozita's neck. Then Rozita became unconscious. 'Lepas itu OKT pengsan.' Then the accused got up and began hitting his head against the wall. The accused was silent as he was hitting his head against the wall. Just about then, SP11 entered the kitchen. Before that, there were no other persons in the kitchen; the only persons in the kitchen were accused, Rozita and herself. From the time she was heating up food for Rozita until the entry of SP11 into the kitchen, she did not hear any conversation between accused and Rozita (see p 18 of the NP). SP11 took possession of a knife (later identified by SP8 as P8A) from the accused. That knife did not originate from her house. She took the knife from SP11. She covered the knife with a towel (later identified by SP8 as P20A). SP11 then headed off to summon for an ambulance. Again the accused was hitting his head against the wall. She called out loudly to her son (Mohd Yusri), then in his bedroom, to come out and render assistance. Mohd Yusri went over to the accused. Mohd Yusri tried to lift the accused, but the accused collapsed onto the floor. Mohd Rafiz then entered the kitchen and went over to Rozita. 'Mohd Rafiz memeluk mak dan menangis. Saya pergi ke Mohd Rafiz dan pujuk dia.' Then SP11 and her nephew (Mohd Nazrul) entered the kitchen. SP11 and Mohd Nazrul attended to the accused while she and Mohd Rafiz remained with Rozita who was motionless. Then an ambulance arrived. She was informed that Rozita had died. No one else touched Rozita or P8A before the arrival of the police. She surrendered the clothing she wore (later identified by SP8 as P16A and P17A) to the police who had asked for them. The blood on her clothing (P16A and P17A) originated from Rozita.

[4] Under cross-examination, SP8 testified that Rozita was good looking, and that the accused loved Rozita very much. As her house was very close to the house of the accused, she had gotten used to hearing quarrels between Rozita and accused. In those quarrels, it was the voice of Rozita that was louder, but the accused never hit Rozita. SP8 agreed with counsel who suggested 'kamu pernah dengar menampar Rozita'. SP8 also agreed with counsel who suggested 'sebab itu Rozita meninggalkan rumah beberapa hari dan kamu lihat seorang pemandu lori hentikan lori didepan rumah awak dan turunkan Rozita. Tetapi OKT, walau melihat itu tidak marah dan tidak pukul Rozita. Perkara itu berlaku empat tahun sebelum Rozita meninggalkan rumah pada bulan enam tahun 2001, semasa pergi kerja di Hospital Muar dan terus tidak balik. Rozita meninggalkan penjagaan dua anak kepada OKT. OKT ada pergi ke kediaman Rozita di Parit Sakai Darat, dan memujuk Rozita balik dan berbaik semula.' She and Mohd Zainuddin had been to Rozita's house, to try to convince Rozita to return home. SP8 agreed that the wedding of her child was held on 2 September 2001, that her neighbours helped to put up the bangsal, that her neighbours came at 8am on 3 September 2001 to dismantle the bangsal, that she was also supposed to help dismantle the bangsal, that at sometime after 7am she heard Rozita wishing 'salam' to those inside her house, that thereafter Rozita was at the door of her kitchen, that thereafter the accused came to her house, that thereafter Rozita

and accused went over to the house of the accused to see Mohd Rafiz who was not well, that a few minutes later Rozita and accused were back at her kitchen, that thereafter she heard the accused saying 'abang pegang Ita tak boleh ke, kan Ita masih isteri abang'. However, SP8 disagreed that Rozita had said or replied 'kita kawan sahaja, bukan suami isteri'. SP8 agreed that as she was heating up the food, she felt Rozita tapping her back and calling 'Kak Kiah' and then felt that her clothing were wet, that SP11 entered the kitchen only after Rozita had cried out, that the accused was in a state of 'bingung', that the accused fainted (pengsan), and after he (accused) recovered the accused hit his head against the wall.

[5] Under re-examination, SP8 said that Mohd Zainuddin is no longer living in the house of the accused, that about ½ a month after Rozita had left the accused she went to look for Rozita as she saw that the accused was heart-broken, that she failed to reach Rozita, that there were quarrels between the accused and Rozita that she was not aware of, that save for what she had related she heard no other words exchanged between accused and Rozita in the kitchen. SP8 lastly said that the accused wanted to reconcile with Rozita, but Rozita showed no such intention.

[6] SP11 testified as follows. SP8 is his wife. The accused is his younger brother. Rozita (whom SP11 identified from the photographs produced in court) was the wife of the accused. Mohd Zainuddin and Mohd Rafiz are the sons of the accused. The house of the accused was about 10 feet away from his (SP11) house. At 8am on 3 September 2001, he was home after sending his (SP11) child to school. He went straight to the bangsal by the side of his house. A wedding had been held on 2 September 2001, and some cooking pots were left unwashed. He cleaned some pots. He was alone at the bangsal. Then SP8 came over to the bangsal and took some food, 'nasi minyak', from one of the pots. He asked who would be eating nasi minyak that early in the morning. SP8 replied that Rozita and the accused were inside their house. SP8 took some food into the kitchen. He continued with his chores. About 10–15 minutes later, he heard a loud quarrel in his house. He paid no attention, as he had gotten used to the quarrels between accused and Rozita. About 5–10 minutes later, he heard the voice of Rozita crying 'Kah Kiah'. Startled, he ran to the kitchen of his house. Rozita was covered in blood and was staggering in the kitchen. Then Rozita collapsed onto the floor. The accused was in the kitchen. The accused had a knife pointed at himself. When he tried to remove that knife from the accused, the accused stab his own neck with that knife. Then, the accused collapsed onto the floor. Then the accused pointed the knife at his (accused) stomach. He then succeeded in removing the knife (later identified by SP11 as P8A) from the accused. He put the knife on a chair. He headed off to a neighbour's house to telephone for an ambulance. About ½ an hour later, an ambulance arrived. He had tried to hold on to the accused. The accused had bloodstains on him. Inspector Rashid (SP12) took possession of the clothing he wore (later identified by SP11 as P18A and P19A) which were stained with blood.

[7] Under cross-examination, SP11 testified that Rozita and accused had been married for 21 years. Rozita married the accused when she was 16. After his marriage to Rozita, the accused erected his house next to his (SP11). Rozita and accused frequently quarrelled. During those quarrels, the voice of Rozita was always louder.

He had not seen the accused hitting Rozita. The accused had a patient disposition. The accused was a teetotaller. The accused was not a gambler. Rozita left the accused about 3 months before the incident. On 2 September 2001, the accused and his neighbours helped to put up the bangsal. All brought their own tools. The bangsal was supposed to be taken down on the morning of 3 September 2001. The frame of the bangsal had been secured by wire. The accused had been entrusted to cut the wire. P8A was the most suitable tool to cut wire. Other than in the kitchen, he had not seen the accused with P8A. When Rozita was staggering, he noticed that the appearance of the accused was like he was not fully conscious, but the accused was not in a state of anger — 'OKT macam tidak sedar diri, bukan dalam keadaan marah' (see p 42 of the NP).

[8] Under re-examination, SP11 said that pliers are most suitable to cut wire. On 3 September 2001, before he (SP11) entered the kitchen, he had not seen the accused. On 3 September 2001, he had not heard the quarrels between Rozita and accused for three months.

[9] Mohd Rafiz bin Ab Razak (SP10) testified that he is a 15 year old student. Mohd Zainuddin is his elder brother. He could not contact his elder brother who had not returned home. His elder brother would not answer his telephone calls. His father is the accused. His father worked in the village. His mother, Rozita, worked as a cleaner at the Muar General Hospital. In 2001, he was 12 years old. On 3 September 2001, he was down with fever and did not attend school. He was asleep in his house (the house of the accused) when he was awakened by his mother. His mother then walked to the kitchen. His father followed her to the kitchen 'kerana lama tak jumpa dan peluk emak'. His mother then went over to the house of his aunt (SP8). He went to the kitchen to wash his clothing. Later, he heard the cry of his mother. He went over to SP8's house. His mother who was covered in blood was holding onto the back of SP8. His mother then collapsed in the middle of the kitchen. He went over to his mother and held her hand. His mother was still alive. There was blood on her neck, body and hands. He headed off to telephone for an ambulance. 'Tak dapat dihubungi.' He returned to SP8's house. He attempted again to telephone for an ambulance. 'Juga tidak dapat dihubungi.' He then sat down at the bangsal until the arrival of an ambulance. He did not re-enter SP8's house. His father had used P8A to clear weeds/grass. His father had kept P8A in his house. His mother had not lived with his father for the past two months. His father and mother frequently quarrelled.

[10] Under cross-examination, SP10 said that he did not see his father helping to put up the bangsal on 2 September 2001. He had never seen his father hitting his mother. Whenever there was a quarrel, his father would lose to his mother. His father loved his mother. In the kitchen [of his house], his mother said 'kita bukan suami isteri'. 'Ada perbualan, tetapi saya tak dengar.' His father was calm when he (accused) followed his mother to SP8's house. Under re-examination, SP10 said that his father had not been invited by his mother to follow her to SP8's house.

[11] A government pathologist (SP9 — Dr Shahidan bin Md Noor) testified that he conducted the post-mortem on Rozita and prepared the post-mortem report

(P29), and that all conclusions in P29 were based on his own findings. Death was caused by the incised wound on the front of the neck. There were a stab wound measuring 2.5 x 0.5 x 3.5cm and an incised wound measuring 5.5 x 6 x 2.5cm, above the jugular notch. There were no other wounds. The incised wound severed the carotid artery supplying blood to the brain. Death came about within three minutes. The stab wound only caused soft tissue injury and was not fatal. Both wounds would have been caused by an implement with a cutting edge and a pointed end, which could both cut and stab. P8A (measuring 14 x 2cm) could have been the weapon. Those wounds were not self-inflicted. If those wounds were self-inflicted, then there would be other hesitant wounds and other superficial wounds on the accessible parts of the body. He collected blood, hair and fingernail specimens from Rozita and then handed them together with the blood soiled clothing of Rozita to Inspector Rashid.

[12] Under cross-examination, SP9 disagreed that those two wounds were caused by one blow. SP9 could not relate the position of the assailant in relation to Rozita.

[13] Under re-examination, SP9 maintained that there were two blows; one blow caused the incised wound and the other blow caused the stab wound.

[14] The testimony of the rest of the prosecution witnesses may be summarised as follows.

[15] SP1 (Corporal Mohd Nasir bib Hashim) testified that on 2 January 2002, Inspector Rashid Tamin bin Abdullah forwarded 18 sealed packages (marked E1–E18 by the investigation) containing exhibits in connection with Parit Jawa Report 1063/2001 and as particularised in Store Registration Number 1/2002, to the police store for safekeeping, that on 4 February 2002 Inspector Rashid (SP12) took out packages E5, E13, E14, E15 & E16, that on 10 June 2002 Inspector Rashid returned packages E5, E13, E14, E15 & E16, all with the seal of the Chemistry Department, and further forwarded two envelopes marked JK and E19, to the store for safe-keeping. SP1 was not cross-examined.

[16] SP2 (Corporal Hamdan bin Haji Ali) testified that he took over the duties of SP1, that no packages or envelopes had been removed from the store save on the occasion of this trial, and that the edges of envelopes E2 (later marked as P5) and E11 (later marked as P14) had probably been eaten away by cockroaches. SP2 was not cross-examined.

[17] SP3 (Corporal Mohd Khairdir bin Haji Osman) testified that at 8.55am on 3 September 2001, he took 10 pictures [P24(1-10)] of the scene at T/L 351, Kampong Parit Pecah, Parit Jawa, Muar, and that on 5 September 2001, he took four pictures [P25(1-4)] of the body of Rozita. SP3 was not cross-examined.

[18] SP4 (Sergeant Sahar bin Abdul Manan) testified that at 8.30am on 3 September 2001, he received a telephone call from a member of the public informing that a 'pergaduhan suami isteri di Parit Pecah' had resulted in death to one and injury to the other, that he reduced that information into Parit Jawa Police

Report 1063/2001 (P26) and then conveyed the contents of P26 to [Sergeant] Tajuddin bin Harun. SP4 was not cross-examined.

[19] SP5 (Assistant Superintendent of Police Che Mahzan bin Cik Aik) testified that he arrested the accused at 11.45am on 3 September 2001 at Ward 4 of the Muar General Hospital, that there was a bandage around the neck of the accused who was conscious, that he posted a police guard on the accused until he (accused) was discharged from hospital, and that he reported the arrest vide Muar Police Report 5943/2001 (P27). SP5 was not cross-examined.

[20] SP6 (Chief Inspector Subramaniay a/l Kunju) testified that on 5 June 2001 he was instructed by Inspector Rashid to collect some exhibits pertaining to Parit Jawa Police Report 1063/2001 from the Chemistry Department at Petaling Jaya, that at 12.45pm on the same day he received eight packages (E5, E13, E14, E15, E16, E18, E19, & JK), all with the seal of the Chemistry Department at Petaling Jaya, from one Dr Seah Lai Hong who handed a chemist report (P28) to him, and that at 4pm on the same day he handed all those packages and report to Inspector Rashid. SP6 was not cross-examined.

[21] SP7 (Sergeant Ahmad Tajudin bin Harun) testified that at 8.37am on 3 September 2001, he was informed of the first information report (P26). He read P26 and then proceeded to the scene with Lance Corporals Mokhtar bin Shuib and Musa bin Muhamad. He reached T/L 351, Kampong Parit Pecah, Parit Jawa, Muar at 8.50am. A large crowd had gathered outside the house. There was an ambulance by the side of the road. He entered the house through the kitchen. A dead woman was lying on the kitchen floor. A man was lying on the floor about five feet from the body of the woman. The head of the woman was covered with a piece of cloth. He removed that cloth. There were wounds on the neck of the woman. That woman was not breathing. The man had blood on his body and injuries on his neck. A medical officer was attending to that man (identified by SP7 as the accused). Later, he permitted that medical officer to send the accused to hospital for further treatment. He secured the scene. Meantime, Inspector Rashid had instructed him to await his (Rashid) arrival. There was a bloodstained knife (later identified by SP7 as P8A) on a chair in the kitchen. He briefed Inspector Rashid who had arrived at 10am. SP3 took some photographs. Those photographs mirrored the scene as he found it. He did not touch or remove anything from the scene. P24(1) was taken from outside the house. P24(2, 9 & 10) were photographs of the woman. P24(6) was the photograph of the bloodstained knife. The bloodstains seen in the photographs were there when he arrived at the scene. SP7 was not cross-examined.

[22] The investigation officer (SP12–Chief Inspector Mohd Rashid Tanin bin Abdullah) testified that at about 8.50am on 3 September 2001, SP7 informed him of the homicide of a Malay female at Parit Pecah, Parit Jawa. He and a police party consisting of Detective Lance-Corporal Sharif bin Ahmad, SP3, Detective Lee Chim Shim, Sergeant-Major Aziz bin Mokhtar, Detective Korporal Salim bin Jaafar, Detective Lance-Corporal Raja a/l Govindasamy, and Detective Lance-Corporal Tusham bin Md Kamar, rushed to the given address. There, he found SP7 and his party. SP7 briefed him and then took him to the kitchen of T/L 351, Kg. Parit Pecah,

Parit Jawa, Muar. In the kitchen was the body of a woman lying face up and with her face covered. There was blood on the floor near the kitchen door and at other places of the floor of the kitchen. There were drops of blood on the wall near the kitchen door. There was a knife on a chair. He marked out the locations of those bloodstains with the letters E1 to E7 (see p 45 of the NP). Photographs P24(1–10) were taken on his instructions. When he got near to the body, he saw that there were wounds on the neck. He made a sketch plan and key of the scene (see P30 and P30K). He collected specimens of the bloodstains. He took possession of a knife, a towel, and the clothing worn by SP8 and SP11. At 2.25pm, he was informed by SP5 of the arrest of the accused. He proceeded with SP3, to the Muar General Hospital. At Ward 4, he found the accused with a dressing on his neck. He was present during the post-mortem conducted on Rozita. Photographs P25(1–4) were taken on his instructions. After the post-mortem, SP9 handed him a hospital bag containing the blood and hair specimens and nail clippings of Rozita. SP9 also handed him the clothing of Rozita. At 3pm on 5 September 2001, he packed the exhibits. The blood specimens collected from E1 to E7 were put into separate envelopes marked E1 to E7, according to the place of collection. He packed: (i) the clothing of Rozita into separate envelopes marked E8 to E12; (ii) the clothing of SP8 into separate envelopes marked E13 to 14; and (iii) the clothing of SP11 into separate envelopes marked E15 to E17. He packed the hospital bag containing the blood and hair specimens and nail clippings into an envelope marked E18. He also marked all envelopes with the number of the police report and number of the investigation paper, and with the name of the investigation officer. He ealed all envelopes with police seal PDRM 178. At 11.20 a.m. on 6 September 2001, he handed envelopes E1 to E18 to Abdullah bin Mohd Yusof (SP13). At 10.15 a.m. on 28 December 2001, SP13 returned envelopes E1 to E18, all with the seal of the Jabatan Kimia. He also received a report (P32) and an envelope marked JK from SP13 who requested that envelopes E5, E13–E16, E18, and JK be forwarded to the Jabatan Kimia at Petaling Jaya. At 12.45pm on 2 January 2002, he forwarded envelopes E1–E18 to the storekeeper. On 4 February 2002, he took out envelopes E5, E13 –E16, and E18 from the store. At 11.35am on 5 February 2002, he forwarded envelopes E5, E13–E16, E18 and JK to Dr Seah Lay Hong (SP14) of the Jabatan Kimia at Petaling Jaya. On 1 February 2002, he witnessed the Muar General Hospital taking a blood specimen from the accused. He was handed that blood specimen in a test tube. He packed that blood specimen in an envelope marked E19. He also handed that envelope E19 to Dr Seah Lay Hong. On 5 June 2002, SP14 returned envelopes E5, E13–E16, E18 and JK. He also received the report (P28) of Dr Seah Lay Hong. At 4.15pm on 10 June 2002, he deposited those envelopes with the store.

[23] Under cross-examination, SP12 said no attempt was made to lift the fingerprints on the knife. On 3 September 2001, he saw the accused with a bandage around his neck. The accused had a wound on his neck. The defence handed him a copy of a medical report (ID35) on the accused. On 10 September 2001, he instructed Inspector Hanafi bin Kasiran to record a caution statement from the accused.

[24] Under re-examination, SP12 clarified that there no attempt was made to lift the fingerprints on the knife because of the bloodstains on the knife.

[25] Under further cross-examination sought by the defence, SP12 said that he had not taken into possession the clothing worn by the accused at the scene, that in his (SP14) report (P32) the chemist requested for a blood specimen of the accused to be taken and tested but not for the clothing of the accused to be taken into possession, and that he did not take the clothing of the accused into possession even after he received a medical report on the accused. On 3 September 2001, there was a bangsal beside T/L 351, Kg Parit Pecah, Parit Jawa, Muar. He did not search for other weapons or for other tools. Hair and nail specimens were not taken from the accused.

[26] Under further re-examination, SP12 clarified that he had not taken into possession the clothing worn by the accused at the scene, as the accused when arrested was in hospital attire, that he received the medical report on the accused on 2 July 2002 and that by then he could not obtain the clothing worn by the accused at the scene. He did not search for other [possible] weapons as the weapon had been recovered. He did not see other [possible] weapons with bloodstains.

[27] The last two witnesses for the prosecution were government chemists. Abdullah bin Mohd Yusof (SP13) testified that he commenced and completed his examination of E1–E18 on 13 September 2001, and that his examination was to detect blood and to determine the blood group. The Chemistry Department at Johore Baru was not equipped to carry out DNA testing. For that reason he instructed that E5, E13–E16, and E18 be forwarded to the Chemistry Department at Petaling Jaya. After his examination, he prepared his report (P32). All conclusions in P32, namely: (i) that the cotton wool in envelopes E1–E7 contained human blood but that the human blood was not suitable for blood grouping; (ii) that the clothing [of Rozita] in envelopes E8–E12, the clothing [of SP8] in envelopes E13 & E14, the clothing [of SP11] in envelopes E15–E17, and the towel in envelope E18, all bore 'O' group human blood; and (iii) that the blood specimen [from Rozita] in envelope E18 was of the blood group 'O', were based on his own findings. He smeared a specimen of blood from E18 onto a FTA card. He placed that FTA card into an envelope marked JK.

[28] Under cross-examination, SP13 said that he did not detect blood in the cotton-wool (P10A) from envelope E7.

[29] Under re-examination, SP13 reiterated that his examination was only to detect blood and to determine the blood group.

[30] Dr. Seah Lay Hing (SP14), a government chemist of the Chemistry Department at Petaling Jaya, testified that on 5 February 2002, he received eight envelopes marked E5, E13–E16, E18, E19 and JK in connection with Parit Jawa Police Report 1063/2001. He commenced his DNA (deoxyribonucleic) testing on 11 March 2002, and completed the same on 11 April 2002. He then prepared his report (P28). In envelope E5 was a knife bearing human blood of a male and a female, the main contributor being the male. From the items in envelopes E13 and E14 [clothing of Rozita], he found the blood of a female. From the item in envelope E15 [trousers of SP11], he found the blood of a male. He could not obtain a DNA profile from the item in envelopes E16 [shirt of SP11] and JK [FTA card]. From the

blood specimen in E19 [blood specimen of the accused], he obtained a DNA profile. On comparing the DNA profiles, he found that the individual in E13 and in E14 was a single female, that the individuals in E5 [knife] were the donor of E19 and the female in E13 and E14, and that the individual in E15 [trousers of SP11] was the donor of E19. The blood in JK had degraded and was not suitable for DNA profiling.

[31] Under cross-examination, SP14 said that he did not carry out tests to ascertain the blood group. SP14 reiterated that the individual in E19 was that individual in E15. SP14 was not re-examined.

[32] At the close of the case for the prosecution, Tuan Haji Mohd Khalil bin Haji Abd Ghani for the accused submitted as follows. SP8 heard her name being called. She turned and saw the deceased. But SP8 did not say that the accused had anything in his hands. SP8 said she saw SP11 taking a knife from the accused. SP8 took that knife from SP11, and put it on a chair. SP11 said that he went into the kitchen when he heard the deceased calling 'Kah Kiah'. SP11 saw the deceased staggering. SP11 saw the accused with a knife. SP11 took that knife from the accused. SP8 and SP11 were the witnesses with Rozita just before she died. SP8 and SP11 were at the scene in a matter of seconds. In the case of SP8, she was at the scene. No other witnesses were at the scene. No one saw the actus rea. It could not be inferred, just because the accused was near the deceased, that he did it. The prosecution must prove that he did it. The conclusion in the report (P29) of the chemist was hearsay. The cause of death as said by SP9 was not conclusive. The incised wound could not be the cause of death. Cause of death is normally described as loss of breath, loss of blood, or haemorrhage. Therefore, the cause of death had not been proved. SP9 did not specify the exact cause of death. SP9 only gave a description of the injury. Therefore, P29 was not conclusive. SP9 only took nail clippings from the left side of Rozita. SP13 found those nail clippings to be free of blood, but SP14 detected the presence of blood. Therefore, there was a discrepancy between the testimony of SP13 and the testimony of SP14. That discrepancy was not explained by the prosecution. The stab wound could not be seen in photographs P25(3 & 4) which should show that stab wound. Photographs P25(1 & 2) and P24(10) did not show that stab wound. Photographs P25(3–5) showed that Rozita had minors wounds on her left cheek. Photograph P25(31) showed that Rozita had a wound on her lower lip. Photograph P25(4) showed various cuts on her left shoulder. 'The prosecution should show what they were.' They could be hesitant wounds. Because of the hesitant wounds on the deceased, the testimony of SP9 that the wounds were not self-inflicted must therefore be doubted. Why were nail clippings only taken from the left side of Rozita. The clothing worn by the accused was not taken into possession. There was no proof that the blood of Rozita was detected on the accused. The prosecution relied on circumstantial evidence. The prosecution failed to prove motive. The total body of evidence was not sufficient to prove the charge.

[33] The learned Deputy Prosecutor, Haslinda bte Abu Bakar, commenced her submission with a fleeting reference to *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, and then said that all three ingredients of murder, namely: (i) death of the deceased; (ii) that death was caused by the act of the accused, and (iii) that the act of the accused was with the intention as stated in s 300 of the Penal Code, had been

proved. In relation to the evidence adduced by the prosecution, the learned DPP made the following remarks. The deceased had been away from the matrimonial home for three months. On the morning in question, the deceased was at the [erstwhile] matrimonial home to visit her younger son who was not well. SP10 testified that the accused tried to hug the deceased. The deceased then walked over to SP8's house. The accused followed. There was no quarrel in the house of the accused. There was only a conversation. In the house of SP8, the deceased was in the kitchen. The accused entered that kitchen about 5 to 10 minutes after Rozita. There were only 3 persons in the kitchen. SP8 heard the accused talking to the deceased. As SP8 was heating up some food, she heard her name being called out loud. SP8 felt that her clothing was wet with blood. She turned. She saw the deceased staggering and then falling onto the floor. Only the accused was there, by the side of the kitchen door. At about that time, SP11 entered the kitchen and saw the deceased still on her feet. At about that time, the accused held a knife. SP11 testified that the accused first pointed the knife at himself and then stabbed his own throat. The accused then fell onto the floor. The accused then pointed the knife at his (accused) stomach. Both SP8 and SP11 identified the knife in question. Only that knife had blood. SP10 testified that that knife belonged to the accused who kept it in his (accused) house. SP8 confirmed that that knife did not originate from her house. The pathologist testified that the wounds would have been caused by a weapon like the knife in question. The pathologist testified that those 2 wounds could not have been self-inflicted. Motive is not an ingredient. But there were matrimonial differences. The knife was taken to SP8's house after the deceased rebuffed the accused. Hence, the accused went over to SP8's house with knife to kill. The knife was DNA tested. The knife bore the blood of the deceased and accused. The clothing of SP8 was soaked with blood of the deceased, blood that matched the blood of the female on the knife. Blood on the trousers of SP11 matched the DNA of the accused and the blood of the male on the knife. Intention to kill is inferred from the act. The accused brought along a knife. Both wounds were directed at the neck, a critical part of the body. That the accused tried to inflict self injury showed the intention to kill the deceased and then himself. The testimony of the pathologist was not challenged. The pathologist testified that there were only two wounds. What counsel contended were minors wounds were in fact bloodstains. The chemists' different findings on the nail clippings did not affect the prosecution case. The clothing of the accused was not taken into possession, as the accused when arrested was in hospital attire. The accused was no longer there when SP12 reached the scene; SP7 had authorised the accused to be sent to the hospital for further treatment.

[34] Learned counsel replied that SP11 heard a quarrel inside his house. '[There was a] sudden quarrel. Therefore, anything could have happened.' SP8 also held the knife and thereby could have transmitted female blood [onto the knife].

[35] Section 180(i) of the Criminal Procedure Code (FMS Cap 6) provides that 'when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused'.

[36] In *Looi Kow Chai & Anor v PP* [2003] 2 MLJ 65, at pp 80–81, the Court of Appeal per Gopal Sri Ram JCA answered the test to be applied in determining whether a prima facie case has been made out, in the following words:

> In our respectful view, the correct test to be applied in determining whether a prima facie case has been made out under s 180 of the CPC (and this would apply to a trial under s 173 of the CPC) is that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 270:
>
> > To summarize, it would therefore appear that having regard to the prosecution evidence adduced so far, a prima facie case has not been established against Nordin Johan and Aziz Abdullah, the second accused and the fourth accused which, failing their rebuttal, would warrant their conviction. In other words if they elect to remain silent now (which I hold they are perfectly entitled to do even though they are being tried under the Emergency Regulations) the question is can they be convicted of the offence of s 302 read with s 34 of the Penal Code? My answer to the question is in the negative.
>
> We are confident in the view we have just expressed because we find nothing in the amended s 180(1) of the CPC that has taken away the right of an accused person to remain silent at the close of the prosecution case. Further we find nothing in the legislative intention of Parliament as expressed in the language employed by it to show that there should be a dual exercise by a judge under s 180 when an accused elects to remain silent as happened in *Pavone v Public Prosecutor* [1984] 1 MLJ 77. In other words, we are unable to discover anything in the language of the recently formulated s 180 that requires a judge sitting alone first to make a minimum evaluation and then when the accused elects to remain silent to make a maximum evaluation in deciding whether to convict or not at the close of the prosecution case.
>
> It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

[37] At the same time at p 85, Gopal Sri Ram JCA judiciously added that subjecting the prosecution evidence to a maximum evaluation does not mean that the prosecution has to prove its case beyond a reasonable doubt at the intermediate stage:

> If this passage is meant to suggest that the evidence led by the prosecution must receive maximum evaluation, then we would agree with it. But if what is meant is that a court ought to go further and determine whether the prosecution at the end of its case has proved the case against the accused beyond a reasonable doubt, then we find ourselves in disagreement with the learned judge in that case. *In our view, subjecting the evidence of the prosecution to maximum evaluation to determine if the defence is to be called does not mean that the prosecution has to prove its case beyond a reasonable doubt at this intermediate stage.* (Emphasis added.)

[38] In *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, it was submitted by counsel for the appellant that the burden on the prosecution at the close of its case is to make out a case which is beyond reasonable doubt. The learned deputy public

prosecutor relied on *Looi Kow Chai* to contend to the contrary. The Federal Court per Augustine Paul JCA, as he then was, held the similar view that it is not the burden on the prosecution to make out a case which is beyond all reasonable doubt at the close of its case. Augustine Paul JCA had no comment on the 'maximum evaluation of the prosecution evidence at the close of the prosecution case' as enunciated in *Looi Kow Chai*. At p 315, Augustine Paul JCA used a different phrase. His Lordship called on a trial court at the close of the case for the prosecution, to 'undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established'. And at the same p 315, Augustine Paul JCA defined a prima facie case as 'one that is sufficient for the accused to be called upon to answer', a definition that his Lordship first developed and then explicated as follows (at pp 315–316):

> Section 180(1) makes it clear that the standard of proof on the prosecution at the close of its case is to make out a prima facie case while s 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The standard of proof on the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms. The submission made must therefore be ratiocinated against the background of the meaning of the phrase 'prima facie case' in s 180. Section 180(2) provides that the court shall record an order of acquittal if a prima facie case has not been made out while s 180(3) provides that if a prima facie case has been made out the accused shall be called upon to enter his defence. A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase ' prima facie case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary* (11th Ed) as:
>
> > A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
>
> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

As the accused can be convicted on the prima facie evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The prima facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

It follows that the submission of counsel that the burden on the prosecution at the close of its case is to make out a case which is beyond reasonable doubt and not on a prima facie basis is contrary to the clear and plain language of s 180 and s 182A. It cannot therefore be sustained.

[39] But later, in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, the Federal Court reverted to the phrase 'maximum evaluation of the prosecution evidence' to describe the test to be applied:

In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 63. Augustine Paul J described what a prima facie case is in the following terms:

> A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence.

The judgment in that case was subjected to scrutiny both by the Court of Appeal and this court. See [2000] 2 MLJ 486 and [2002] 3 MLJ 193. Neither court criticised the above quoted passage as being an incorrect interpretation of s 180 of the CPC. Further, the Court of Appeal in*Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 expressly approved and preferred the test in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* to the test formulated in the other cases decided by the High Court. As such, we have no hesitation in affirming the test formulated by the Court of Appeal in *Looi Kow Chai*.

[40] However, there is a most valuable guide in *PP v Mohd Radzi bin Abu Bakar*, on the steps to be taken by a trial court at the close of the prosecution case.

For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:

(i) at the close of the prosecution's case, subject the evidence led by the prosecution in its

totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted;

(iii) after defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v Public Prosecutor* [1963] MLJ 263.

[41] The accused is charged with murder, an offence which consists of three ingredients, namely that: '(i) the death of a human being has taken place; (ii) such death has been caused by, or in consequence of, the act of the accused; (iii) such act was done with the intention of causing death; or it is done with the intention of causing such bodily injury as (a) the accused knew to be likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death; or the accused caused death by doing an act known to him to be so imminently dangerous that it must in all probability caused (a) death, or (b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury' (*Ratanlal & Dhirajlal's Law of Crimes* (25th Ed) p 1491). Suffice it to say that motive is not a necessary ingredient to be established in the offence of murder (see *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, at p 282 where Abdoolcader FJ. said: 'Although motive is not a necessary ingredient to be established in the offence of murder, it would if shown tend to support the case against an accused so charged').

[42] Unless within the exceptions, it is murder if the act by which death is caused is done with the intention stated in s 300 of the Penal Code. 'The mere fact that bodily injury caused resulted in death in the ordinary course of nature does not necessarily mean that the accused intended to cause such bodily injury. There must always be a finding that the act which caused the death was done with the intention either of causing death or causing bodily injury sufficient in the ordinary course of nature to cause death. A finding of inflicting an injury that was merely likely to cause death would not of necessity amount to murder. The intention or knowledge with which the act which caused death was committed is not constructive or a presumption of law but a matter of fact to be judged in each case, and proof of collateral facts to explain the motives and designs of the accused is admissible. In cases in which death ensures from violence used, and there is no evidence of intention other than what is to be inferred from the accused's act, it is necessary to consider whether the accused must have known, when committing the act, that: (a) it might possibly, but was unlikely to cause death or injury sufficient in the ordinary course of nature to cause death; (b) it was likely to cause death or injury sufficient in the ordinary course of nature to cause death; (c) it probably would cause death or injury sufficient in the ordinary course of nature to cause death. If the act falls under the first category, it would not amount to more than hurt or grievous hurt; if under

the second category, it would be culpable homicide not amounting to murder; if under the third category, it would amount to murder' (*Ratanlal & Dhirajlal's Law of Crimes*, p 1491). 'Putting it shortly, all acts of killing done with the intention to kill, or to inflict bodily injury likely to cause death, or with the knowledge that death must be the probable result, are prima facie murder, while those committed with the knowledge that death will be a likely result are culpable homicide not amounting to murder' (per Straight J, in *Idu Beg* [1881] 3 All 776, at p 778 as quoted in *Ratanlal & Dhirajlal*, p 1296). 'A bare killing, without proof of intention or knowledge as required by that section, can never be murder. It is not sufficient for the prosecution to prove merely the killing, without proving intention or knowledge as required by that section set out in that definition … '(*Hashim bin Mat Isa v PP* [1950] MLJ 94 at p 95 per Willan CJ). 'The prosecution must … bring the case under any of the four clauses of s 300, to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any of the 4 clauses of section 300 … the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under s 299' (*Kishore Singh* AIR 1977 SC 2267, and quoted in *Ratanlal & Dhirajlal*, p 1296). Yet culpable homicide, even if within clauses (a) to (d), is not murder, when it is brought within the [5] exceptions to s 300. 'The correct approach to the application of [ss 299 and 300] is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300, Penal Code apply, and (b) where the necessary degree of mens rea specified in s 299 is present, but not the special degrees of mens rea referred to in section 300 Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within s 300, Penal Code must necessarily fall within s 299, but all cases within section 299 do not necessarily fall within s 300' (*Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174, at p 176, per Raja Azlan Shah FJ (as HRH then was)).

[43] In relation to the ingredients of the instant charge, the death of Rozita was doubtlessly proved by the pathologist, if not already proved by SP8, SP10, and or SP11. The cause of death was also doubtlessly proved, as it was unchallenged evidence that Rozita died from the incised wound that cut the artery supplying blood to her brain, and that both wounds were not self-inflicted but were caused by an implement with a cutting edge and a pointed end, which could both cut and stab, and which could have been the knife in question.

[44] Learned counsel submitted that 'no one saw the actus rea'. That might be so. But the identity of the assailant and the weapon used could be extrapolated from the following unchallenged evidence.

[45] Rozita was last seen alive with the accused at the door of the kitchen of SP8. Thereafter, Rozita had not left the kitchen. Given so, it would have to be that Rozita was attacked whilst she was in the kitchen of SP8. It was unchallenged evidence that Rozita died within three minutes of the fatal blow. The effect of the unchallenged evidence was that the persons in the kitchen just before Rozita was attacked, namely accused and SP8, were in the kitchen of SP8 throughout those three minutes and thereafter. It should go without saying that the weapon could not just walk away

from the scene. Without a human agency, the weapon would remain at the scene. But the effect of the unchallenged evidence was that no other person/s had entered the kitchen of SP8 during the material time or left the scene after Rozita had been attacked. There was no evidence that anything had been thrown out of the kitchen of SP8. It added up that the weapon could not have taken leave of the scene.

[46] It also added up that the assailant could not have taken leave of the scene. The accused and Rozita were standing by the side of the kitchen door as SP8 was heating up food. As said, Rozita had not left the kitchen, and it would have to be that Rozita was attacked whilst she was in the kitchen. SP8 was still heating up food when Rozita patted her (SP8) on her right rear shoulder. But Rozita was already mortally wounded at that point, although she could still walk. It would mean that Rozita was attacked at some point between her standing with the accused at the door of the kitchen and her patting SP8 on her shoulder. So, who could have mortally wounded Rozita? As said, the effect of the unchallenged evidence was that the persons in the kitchen at the point when Rozita was last seen alive, namely accused and SP8, had not left the kitchen, and that no other person/s entered the kitchen during the material time or left the scene after Rozita had been attacked. Rozita was attacked whilst she was in the kitchen. The assailant would also have to be in the kitchen. The only persons at the immediate scene when Rozita was attacked were the accused and SP8. There were no other persons at the immediate scene when Rozita was attacked. It added up that the only persons who could have attacked Rozita were the accused and or SP8. But it was the effect of the unchallenged evidence that SP8 was heating food throughout the period when she (SP8) last saw Rozita alive with the accused at the kitchen door until she felt Rozita patting her shoulder. It was the effect of unchallenged evidence that SP8 was heating up food when Rozita was attacked. It was the effect of the unchallenged evidence that SP8 was not the assailant. That left the accused as the only possible assailant.

[47] But the identification of the assailant was established not just by a process of elimination. The juxtaposition of the unchallenged evidence imparted the following scenario. The accused and Rozita stood near the kitchen door as SP8 heated up some food. Then Rozita patted SP8 on her (SP8) shoulder and cried 'Kak Kiah'. That cry was heard by SP10 and SP11 who rushed to the kitchen. SP8 and SP11 witnessed Rozita collapsing onto the floor. At that point, the accused was in the kitchen. The accused had a knife pointed at himself. SP11 tried to remove that knife from the accused. With that knife, he accused then stabbed his (accused) neck and then collapsed onto the floor. The accused then pointed that knife at his (accused) stomach. SP11 removed that knife from the accused. According to SP11, he placed that knife on a chair and then headed off to telephone for an ambulance. But according to SP8, she took that knife from SP11 after he (SP11) had taken it from the accused.

[48] When the accused first became 'pengsan' or first began hitting his head against the kitchen wall was not clear. According to SP8, the accused began hitting his head against the kitchen wall even before SP11 entered the kitchen. But when the accused continued to hit his head against the kitchen wall, SP8 called out to her son (Mohd Yusri) to come out from his room and help. Mohd Yusri tried to lift the accused.

SP11 testified that he had also tried to lift the accused who had bloodstains on him (accused), before he (SP11) headed off to summon for an ambulance. When SP11 returned to the scene, he (SP11) and Mohd Nazrul (nephew of SP8 & SP11) attended to the accused, while SP8 and SP10 were with Rozita. Thereafter, SP10 waited at the bangsal for the ambulance to arrive.

[49] When SP10 entered the kitchen was also not clear. According to SP8, SP10 entered the kitchen after Mohd Yusri. If that were so, then SP10 entered the kitchen after SP11 had taken away the knife from the accused. But according to SP10, he saw his mother clinging onto SP8 and then collapsing onto the floor. If that were so, then SP10 entered the kitchen at about the same time as SP11, i.e., before the knife had been taken away from the accused. Incidentally, the finding of SP13 that there was 'O' group human blood on the clothing of SP8 accorded with the testimony of SP10 that he saw his mother clinging onto SP8, and the finding of SP14 that there was the blood of the accused on the trousers of SP11 accorded with the testimony of SP11 that he tried to lift the accused before he headed off to telephone for an ambulance. In any event, there was complete agreement in the unchallenged evidence that SP10 went over to his mother who was then still alive and held her hand, before he (SP10) too headed off to telephone for an ambulance.

[50] There was also complete agreement in the unchallenged evidence on the following. Rozita died within three minutes of her artery being cut. Rozita was still alive when SP10 held her hand. Rozita was attacked before she patted SP8 on her (SP8) shoulder. When Rozita patted SP8, the accused was beside the kitchen wall. There was blood at the place where Rozita had stood with the accused. At about the same time that Rozita collapsed onto the floor, the accused had a knife bearing the blood of Rozita [and accused]. Suffice it to say that the latter unchallenged evidence established most conclusively that the accused was found holding a knife bearing the blood of Rozita, at what would have been the very place where Rozita would have been attacked just moments earlier. As said, the weapon could not have taken leave of the kitchen, and the only possible assailant was the accused. Now given the proximity in time and place between the attack on Rozita and the accused found holding a knife bearing the blood of Rozita, and putting all things together, there could be only one conclusion. The accused was found with the smoking gun, so to speak. The accused was the assailant, a fact affirmed, if it needed to be affirmed, by the attempts of the accused to inflict self-injury by hitting his head against the kitchen and by stabbing his (accused) neck, which conduct was not consistent with innocence, and P8A was the weapon, a fact affirmed by the DNA result. And given the unchallenged facts of the case, there was no possibility that the accused was not the assailant or that P8A was not the weapon.

[51] As for the intention of the accused, first it could be said that the injuries could not have been accidentally caused. The conduct of the accused immediately after Rozita had been mortally wounded was not consistent with Rozita being injured accidentally (see *Ratanlal & Dhirajlal*, at p 1395). Furthermore, given the nature of the injuries — separate and distinct wounds which could not have caused by one blow or one stroke — it was clear that the injuries would have been caused by at least

two blows to the neck. One blow or one stroke could be accidental, but two blows or two strokes to the same vital part of the body must be with intent. But what was the specific intent of the accused?

[52] There was no evidence of intention other what could be inferred from the act of the accused. That was no surprise, as it is difficult if not impossible to procure direct evidence to prove the intention of an individual (*Lee Fah Sang v Public Prosecutor* [1967] 2 MLJ 163; *Lim Heng Soon & Anor v Public Prosecutor* [1970] 1 MLJ 166; *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84; *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; *Khoo Hi Chiang v Public Prosecutor* [1994] 1 MLJ 265). Hence 'intention is a matter of inference' (*Tham Kai Yau & Ors v Public Prosecutor* at p 176, per Raja Azlan Shah FJ (as HRH then was)). Intention can be inferred from the act or conduct or other relevant circumstances of the case (*Juraimi bin Husin v PP* [1998] 1 MLJ 537). Intention to kill can be inferred from the nature of the injuries sustained by the deceased (*Sainal Abidin bin Mading v Public Prosecutor* [1999] 4 MLJ 497.

[53] In relation to intention under the first clause of s 300, *Ratanlal & Dhirajlal*, at pp 1296–1297 commented as follows:

> The first clause of s 300 enacts that culpable homicide is murder if the act by which death is caused is done with the intention of causing death … An intention to kill a person brings the matter so clearly within the general principle of mens rea as to cause no difficulty. Such intention, however, must be found as a matter of fact. It is distinct from presumed or constructive intention. The accused also cannot be held guilty from the knowledge of the consequences of the act.
>
> At the same time, however, it is equally true that intention is a subjective element and in most of the cases direct proof of intention is not forthcoming. It has rightly been said that 'the Devil himself knows not the thought of man'. A man's intention is a question of fact and it can be gathered from his acts. In deciding the intention of the accused, the court may consider the nature of the weapon used, the part of the body of the victim chosen by the accused for attack, the number of blows administered, the force used by the assailant, etc.

[54] In *Virsa Singh v State of Punjab* AIR 1958 SC 465, the Supreme Court stated:

> In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike on a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for if he does not know that there is a heart or a kidney of bowels, he cannot be said to have intended to injure them. Of course that is not simple and based on common sense; the kind of inquiry that 'twelve good men and true' could readily appreciate and understand.
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> ...
>
> ... To determine what the intention of the offender is, each case must be decided on its own merits. Where it is proved that the accused fired a gun shot at such close range that it could not have had other than a fatal effect and it is indicative of the intention of the accused that

> after firing at one person he reloaded the gun and fired another shot at another person there is clear indication of his intention to commit murder. Where a person fires two shots successively at another person his murderous intention is clearly evident. The law looks as regards intention to the natural result of the man's act and not to the condition of his mind. From a legal point of view a person intends whatever he gives others reasonable grounds for supposing that he does intend. Where a man strikes lathi blows on the head of the deceased mercilessly and practically kills him on the spot, he is guilty of murder. Where a man stabs another in a vital part, he must be held to have intended to cause death, and if death ensures either directly from the wound or in consequence of the wound creating conditions which give occasion to the appearance of a fatal disease, the person inflicting the wound is guilty of murder. Absence of premeditation will not reduce the crime of murder to culpable homicide not amounting to murder...

[55] In relation to intention under the second clause of section 300, *Ratanlal & Dhirajlal*, at pp 1302–1304 commented as follows:

> This clause [2] deals with acts done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom harm is caused. The mental attitude here is two-fold. There is first the intention to cause bodily harm and next there is the subjective knowledge that death will be the likely consequence of the intended injury …
>
> The ambit and scope of this clause has been succinctly explained by Hidayatullah, J., (as he then was) in Anda thus:
>
> The secondly in section 300 mentions one special circumstance which tenders capable homicide into murder. Putting aside the exceptions in section 300 which reduce the offence of murder into culpable homicide not amounting to murder, culpable homicide is again murder if the offender does the act with the intention of causing such bodily injury which he knows to be likely to cause the death of the person to whom harm is caused. This knowledge must be in relation to the person harmed and the offence is murder even if the injury may not be generally fatal but is so only in his special case, provided the knowledge exists in relation to the particular person. If the element of knowledge is wanting, the offence would not be murder but only culpable homicide not amounting to murder or even a lesser offence.
>
> In order to convict a person of the offence of murder under this clause it had to be found that he had the intention of causing the injury and also he had the knowledge that the injury he intended to inflict was likely to cause death. The word 'knowledge' imports a certainty and not merely a probability...

[56] On assault cases, *Ratanlal & Dhirajlal*, at p 1304 further observed that 'Intention must be inferred not merely from the natural consequences of his act, but from the act itself, and as the natural consequence of an act of the kind in question would be death'.

[57] In relation to intention under the third clause of section 300, *Ratanlal & Dhirajlal*, at pp 1308–1309 commented as follows:

> This clause [3] views the matter from a general stand point. It speaks of an intention to cause bodily injury which is sufficient to cause death. The emphasis here is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensures

A and the causing of such injury is intended the offence is murder. Sometimes the nature of the weapons used, sometimes the part of the body on which injury is caused, and sometimes both are relevant. The determinant factor is the intentional injury which must be sufficient to cause death in the ordinary course of nature. If the intended injury cannot be said to be sufficient in the ordinary course of nature to case death, that is to say, the probability of death is not so high, the offence does not fall within murder but within culpable homicide B not amounting to murder or sometime less.

In *Rajwant Singh* [AIR 1966 SC 1874, 1978] the Supreme Court stated: said: 'The third clause discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury inflicted is sufficient in the ordinary course of nature to cause death. In this clause, the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does C cause is sufficient to cause death in the ordinary way of nature, the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not.

Explaining cl 3 of s 300,Vivian Bose J in the leading case of *Virsa Singh* observed:

D To put it shortly, the prosecution must prove the following facts before it can bring a case under section 300 'thirdly'.

First, it must establish, quite objectively that a bodily injury is present:

Secondly, the nature of the injury must be proved; These are purely objective investigations.

E

Thirdly, it must be proved that there was an intention to inflict the particular bodily injury, that is to say that it was not accidental or unintentional, or that some other kind of injury was intended;

Once these three elements are proved to be present, the enquiry proceeds further and

F Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry purely objective and inferential and has nothing to do with the intention of the offender.

Once these four elements are established by the prosecution (and, of course, the burden G is on the prosecution throughout) the offence is murder under section 300 'thirdly'. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of the kind will be likely to cause death. *Once the intention to cause bodily injury actually found to be present is proved, the rest* H *of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death*. (Emphasis added.)

Ratanlal & Dhirajlal, at pp 1310–1313 further states as follows:

I This clause [3] states that where bodily injuries intended to be inflicted are sufficient in the ordinary course of nature to cause death the offence falls under this clause. The distinction between this clause [3] and clause [2] of section 299 depends upon the degree of probability of death from the act committed. If from the intentional act of injury committed the probability of death resulting is high, the finding should be that the accused intended to cause death or injury sufficient in the ordinary course of nature to cause death and the

conviction should be of murder; if there was probability in a less degree of death ensuing from the act committed, the finding should be that the accused intended to cause injury likely to cause death and the conviction should be culpable homicide not amounting to murder. It is not correct to say that an injury sufficient in the ordinary course of nature to cause death is an injury, which inevitably and in all circumstances must cause death. If the probability is very great, the requirements of this clause are satisfied, and the fact that the particular individual may by the fortunate accident of his having secured specially skilled treatment, or being in possession of a particularly strong constitution has survived an injury which could prove fatal to the majority of persons subjected to it, is not enough to prove that such an injury is not sufficient in the ordinary course of nature to cause death. If a person knowingly causes injuries which are more likely to cause death that not in the ordinary way, his offence falls under either the second or third clause …

When there are several injuries, and even if none of the injuries is sufficient in the ordinary course of nature to cause death of the deceased but cumulatively they are sufficient to cause death, the offence will be murder and not culpable homicide not amounting to murder. In the case of some classes of injuries, it is easy to say what was intended; for instance, in a wound with a knife in the abdomen. A man who inflicts such a wound intends to inflict a wound which he must know will be dangerous to life … A judge must always find whether the bodily injury inflicted was that which was intended by the accused. The nature of the offence does not depend merely on the location of the injury cause by the accused. *The intention of the person causing the injury must be gathered from a careful examination of all the facts and circumstances of each given case …*

The emphasis in the clause is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death, in the ordinary way of nature. When this sufficiency exists and death follows and the causing of such injury is intended, the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant … The nature of the material object used and the force used as useful guides in arriving at a decision as to whether the intention and knowledge required by the section can be attributed to the accused …

…

… Each case would depend on its own facts and circumstances …

...

… *Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to do with the question of intention.* (Emphasis added.)

[58] On stabbing wounds, *Ratanlal & Dhirajlal*, at pp 1315–1316 has this to say:

… Where the accused inflicted a stab with a sharp-pointed weapon which entered the upper part of the deceased's stomach, causing rupture of it and of the peritoneum, it was held that his act came within this clause. If a person stabs another in the abdomen with sufficient force to penetrate the abdominal wall and the internal viscera, he must undoubtedly be held to have intended to cause injury sufficient in the ordinary course of nature to cause death. It is not necessary that the accused must have the intention to inflict those injuries which he knew were sufficient in the ordinary course of nature to cause death. I*t would suffice if he intended to cause those injuries which were actually caused by him.* If the medical evidence showed that those injuries were sufficient in the ordinary course of nature to cause death, the accused would then be guilty of murder under s 302 …

… the person who uses a sword or aruval chopping of an arm of a leg and by doing so severs the arteries of the arms or the leg, must know that he is inflicting an injury which in the

ordinary course of nature is sufficient to cause death. The offence in that case is clearly murder. Where the accused stabbed the deceased only once in a vital part of the body and the deceased died as a result of that injury and the injury was one which in the ordinary course would have cause death, it was held that the accused was guilty of murder.

The mere fact that the deceased might have been saved if expert medical evidence had been afforded at once makes no difference as to the nature of the crime … (Emphasis added.)

[59] What intent could be inferred or gathered from the act of the accused? What could or would have been the intention of the accused when he, in common parlance, cut the throat of Rozita? The accused stabbed and then slit, or it could be the other way round, the neck of Rozita with a knife measuring 14 x 2cm, a deadly weapon by any reckoning. The accused inflicted a stab wound measuring 2.5 x 0.5 x 3.5cm, and an incised wound measuring 5.5 x 6 x 2.5cm, both above the jugular notch. The attack was directed at the neck and a most vital part of the body that could not have had a fatal effect. As it were, the incised wound cut the artery supplying blood to the brain, and death ensured within three minutes. Would the accused not know that his attack to the neck would surely have a fatal effect? How would the act of the accused compare with the act of a person who fired a gun at such close range that could not have had but a fatal effect and then reloaded the gun and fired another shot at another person, which act was held to have been with murderous intention under cl 1 (see *Ratanlal & Dhirajlal*, at p 1297)? Viewed objectively, it was no different. Indeed, the act of the accused to cut the throat was as deadly as the act to fire a gun at close range. Like that second shot, the second blow was indicative of the intention of the accused. The only difference was the weapon. Other than that, it was the same. Like a shot at close range, the cut to the neck ensured the fatal effect. 'From a legal point of view a person intends whatever he gives others reasonable grounds for supposing that he does intend … Where a man stabs another in a vital part, he must be held to have intended to cause death, and if death ensures either directly from the wound or in consequence of the wound creating conditions which give occasion to the appearance of a fatal disease, the person inflicting the wound is guilty of murder' (see *Ratanlal & Dhirajlal*, at p 1297). There could only be one conclusion; the accused intended the result of his act.

[60] Neither was the act of the accused any different from the act of the person who uses a sword or aruval to chop off an arm or a leg and by doing so severs the arteries of the arms or the leg and who must know that he is inflicting an injury which in the ordinary course of nature is sufficient to cause death, which act was held to have been with murderous intention under cl 3 (see *Ratanlal & Dhirajlal*, at p 1316). The accused caused a bodily injury to Rozita which was sufficient in the ordinary course of nature to cause not only death but certain death. The act was the proof of the intention. The accused intended the injuries, and there was no way that the accused could not not have known that his act would probably cause death (see *Ratanlal & Dhirajlal's Law of Crimes*, p 1491). Quite clearly, the prosecution had proved the intention under clause 1 and under cl 3 of s 300.

[61] There were 2 aspects of the unchallenged evidence that did not quite harmonize. SP11 said that he put the knife on a chair while SP8 said she took the

knife from SP11 after he (SP11) had taken it away from the accused. In any case, it remained that P8A was positively identified by both SP8 and SP11 as the knife that was in the hand of the accused and as the knife that SP11 took away from the accused. One chemist found blood on the nail clippings of Rozita while the other chemist found none, but that discrepancy had no bearing on the all important finding that the knife in the hand of the accused was bearing the blood of Rozita. The prosecution case was unaffected.

[62] The maximum evaluation of the evidence showed that all ingredients of the charge had been proved beyond all doubt. Unless rebutted, the prosecution had adduced evidence that was sufficient for a belief in the existence of the facts stated in the charge. The prosecution had adduced evidence that was sufficient for a conviction should the accused remained silent. In a word, the prosecution had made out a prima facie case.

[63] Accordingly, the accused was ordered to enter upon his defence. The accused elected to give his testimony on oath. But by then, the accused had Mr K Balaguru as his lead counsel who informed the court that the defence would call five witnesses. And for good measure, Mr Balaguru remarked that the accused was rightly called to enter upon his defence, and that the defence is grave and sudden provocation which must be proved by the defence.

[64] The accused testified as follows. He is 53 years old and was a farmer. About 20 years ago, he married Rozita when she was 16. They had three children; one child had passed away. Rozita frequently changed jobs. On 3 September 2001, Rozita was no longer living with him. On 3 September 2001, Rozita had been away from the matrimonial home for about two months. Rozita left when he enquired about the high telephone bill that he uncovered on 9 June 2001. Rozita answered 'abang telefon nombor ini, Rozita akan lari ikut lelaki ini.' Rozita also said that she had to attend a 3 week course at Malacca and then left the matrimonial home. He asked Jafri bin Ismail (SD2) if it were true that Rozita had a course at Malacca. Jafri answered she had not. Rozita did not come home on 9 June 2001, and had not come home since. About two or three weeks after 9 June 2001, he met Rozita at the Muar General Hospital. He tried to persuade Rozita to return home. 'Rozita cakap dia hendak tenangkan fikiran.' He was not angry that Rozita did not want to come home. About two or three days later, he brought SP10 to the Muar General Hospital. He had tried but failed to persuade Rozita to return home. For that reason, he brought SP10 along to try to persuade Rozita to return home. SP10 asked Rozita to return home. He said to Rozita that their son was asking for her. Rozita answered she was busy. He was alone in his third attempt to persuade Rozita. Rozita asked him to go to the office of the Kadi. Rozita asked for a divorce. He did not agree. He departed and then lodged a report with the Kadi. Two or three weeks later, he was summoned by the Kadi to attend counselling. Ustaz Mohamed Ramzan bin Sayuti counselled him and Rozita. Rozita informed the Ustaz that he was a gambler, a drinker, and an irresponsible person, which were all not true. In the presence of the Ustaz, he asked Rozita to come home, as he loved Rozita. Rozita informed the Ustaz that she did not want to return home. Outside the office of the Kadi, Rozita informed him that she

was staying in a rented house in Parit Sakai. He asked Rozita to return home for the sake of SP10. Rozita still refused to come home.

[65] Sometime during the next 14 days, he went to look for Rozita with the same intention to ask her to return home. He met Rozita at Parit Sakai. Again, he tried to persuade Rozita to return home. Rozita refused to return home. 'Tiap-tiap kali Rozita enggan balik saya rasa sedih. Saya tidak rasa marah sebab tak sampai hati.' Later, with SP8, he went to look for Rozita at Parit Sakai. He failed to find Rozita. He proceeded to Rozita's father's house at Sungai Abong. Rozita was not there. He complained to Rozita's father. Thereafter, he did not see Rozita until 3 September 2001. SP10 informed him that Rozita was keeping in touch with him (SP10) through the telephone. During the time that Rozita was away, he and or SP8 looked after SP10. He obtained Rozita's telephone number from SP8. He called that number, but failed to reach Rozita. One day, he found that SP10 was not at home. SP8 informed him that SP10 boarded a bus headed towards Parit Sakai. He failed to find SP10 at Parit Sakai. He asked SP8 to help find SP10. They failed to find SP10. That night, SP10 did not come home. SP8 managed to reach Rozita on the telephone. SP8 informed him that SP10 was with Rozita. He asked SP8 to fetch SP10 home. 'Saya tidak pergi sebab perasaan saya terganggu fikiran, saya tidak senang.' SP10 came home the day after he met Rozita and SP10 at the office of the Kadi. He reported to the police that SP10 had not come home, and that Rozita had taken SP10 without his knowledge. He reported to the police before SP10 informed him that he (SP10) was with Rozita. He was happy to learn that SP10 was safe. 'Sebelum saya dengar suara SP10, saya rasa susah.' SP10 did not come home for three or foyr days. During that period, he did not attempt to contact SP10. He then met Rozita and SP10 at the office of the Kadi. The Kadi had summoned him to attend counselling. After counselling, he took SP10 home. He asked SP10 about his activities over the past three or four days. 'SP10 jawab Rozita bawa jalan-jalan.' On the second occasion before the Kadi, he also asked Rozita to return home. Rozita did not want to return home. Rozita asked for a divorce. He did not agree. 'Saya tak mahu lepaskan sebab saya sayang dia.' On 3 September 2001, Rozita came to the house. Rozita first went to SP8's house. Mohd Zainuddin informed him that Rozita was in SP8's house. A wedding was held in SP8's house on 2 September 2001. A bangsal was erected. He and neighbours helped to put up the bangsal. Various tools were used to erect the bangsal. After the wedding, SP11 asked him to help bring down the bangsal. His task was to cut the wires and bring down the bangsal. SP11 proposed that the bangsal be brought down at 9am on 3 September 2001.

[66] He was beside SP10 who was down with fever and was resting in the hall. Mohd Zainuddin informed him that Rozita was next door. Mohd Zainuddin then went off to work. 'Semasa saya dapat tahu Rozita berada dirumah sebelah saya rasa suka, rasa gembira kerana saya sayang dia.' He went to SP8's house. He met Rozita in the kitchen of SP8. He asked Rozita to go and see SP10 who was not well. SP8 and his elder sister who were in the kitchen heard him said that SP10 was not well. Rozita kept quiet. 'Saya rasa sedih apabila Rozita tidak melayan permintaan saya untuk Rozita tengok SP10.' He went back to his house. He informed SP10 that Rozita was next door. Rozita then came over to his house. 'Rozita tidak beri salam.' Rozita sat near the main door, near SP10. Rozita spoke to SP10. Rozita said she

wanted to take SP10 to eat 'Kentucky'. 'Rozita tidak sentuh badan SP10.' 'Tetapi saya rasa gembira, sebab Rozita mahu tengok SP10 dan mahu bawa SP10 makan Kentucky'. He said to Rozita that he would want to follow, as it had been long since he last saw Rozita. 'Rozita tidak jemput saya ikut. Rozita cakap buat segan sahaja. Saya dapati maksud Rozita adalah saya tidak malu. Rozita cakap di hadapan SP10. Saya rasa sedih, semasa dia kata segan.' He also asked Rozita to return home, but Rozita said she had rented premises. Thereafter, Rozita proceeded to the kitchen to take her clothing. He followed. When he entered the kitchen of SP8, there were Rozita, SP8 and his sister, Fatimah bte Dalek. On 8 August 2001, he reported to the police that Rozita had not come home. D37 was his report. He followed Rozita to the kitchen [of his house]. 'Di dapur saya kata lagi saya hendak pergi ikut makan Kentucky, Rozita kata buat segan sahaja. Saya kata, apa segan, sedangkan kita suami isteri. Rozita diam sahaja. Lepas itu saya cuba pegang dan cium Rozita tetapi dia tak kasi, Rozita elak. Apabila Rozita elak, saya tidak cakap apa-apa. Perasaan saya marah, sebab tak kasi cium. Rozita tak bagi alasan mengapa tak kasi cium. Lepas itu Rozita tak ambil baju. Rozita terus turun tangga rumah. Sebelum turun Rozita tidak kata apa-apa kepada SP10. Semasa Rozita turun tangga, saya berdiri ditempat pintu. Saya tengok dia turun. Sudah tiba dibawah Rozita kata 'sekarang kita bukan suami isteri lagi, kita cuma sebagai kawan sahaja'. Saya tidak setuju dengan apa yang dikata oleh Rozita, sebab Rozita masih isteri saya (see p 93 of the NP). Saya faham kata Rozita sebagai tiada hubungan lagi. Perasaan saya macam hilang fikiran, dan hilangan ingatan. Saya tidak terima hakikat kata Rozita kerana dia masih isteri saya. Saya masuk ke rumah ambil pisau untuk potong dawai bangsal. P8A ini adalah pisau yang saya ambil. Saya ambil pisau itu dari dalam bilik tidur saya. Saya simpannya di dalam bilik tidur saya, sebab takut budak buat main. Saya ambil P8A untuk tujuan memotong dawai bangsal. Dengan pisau, saya turun rumah. Fikiran saya bingung dan hilang ingatan. Dengan pisau saya pergi ke rumah SP8. Lepas itu saya tak ingat, saya sedar saya berada di hospital sahaja. Saya tidak tahu Rozita akan datang pada 3 September 2001' (see p 94 of the NP). Bila saya sedar, saya dapati saya berada di hospital. Saya bertanya misi mengapa berada di hospital. Misi kata saya ada luka dileher. Saya berada di hospital dalam 2 hari, ada polis yang datang. Masa saya sedar, saya dapati saya sedang digari di katil. Lepas hospital, polis bawa saya ke balai polis Parit Jawa. Polis dari Muar datang dan mengambil statement saya. Saya memberi statement semasa di balai Parit Jawa dan juga di balai Muar'.

[67] At that stage of the examination-in-chief of the accused, learned counsel produced what was then the alleged caution statement of the accused. That statement was read to the accused who affirmed that it was his and which was then marked as D38 without objection from the prosecution. Shorn of the formal parts, that caution statement recorded on 10 September 2001 reads as follows:

> Pada 9 Jun 2001 hari Sabtu, saya dapat bil telefon, habis saya tunjukkan kepada isteri saya Rozita. Saya tanyakan pada dia apasal bil ini terlampau tinggi. Kemudian dia jawab, kalau abang telefon nombor ini, Ita akan lari ikut orang ini. Kemudian dia pun bercakap hari minggu dia ada kursus di Melaka selama tiga minggu. Saya tidak puashati, pukul 8 pagi itu (hari Sabtu) saya pergi ke Hospital Muar dan tanya boss isteri saya iaitu Encik Jefri mengenai perkara ini. Encik Jefri beritahu tidak ada. Hari Isnin saya datang ke hospital pujuk orang rumah saya suruh balik. Dia kata dia nak tenangkan fikiran. Habis, lat dua lagi, saya datang hospital lagi bawa anak saya yang kecik jumpa orang rumah saya. Orang rumah saya cakap, jangan sibuk, orang nak kerja dan suruh saya balik. Lat dua tiga hari saya datang

lagi dan orang rumah saya terus ajak saya pergi ke Pejabat Kadi. Saya balik terus pergi ke Pejabat Kadi. Saya repot cakap orang rumah saya semenjak 9 Jun 2001 pergi kerja tidak balik, lepas itu tidak lama Pejabat Kadi panggil saya suami isteri. Di Pejabat Kadi isteri saya cakap saya macam-macam. Dia cakap saya kaki judi, kaki minum. Saya suruh dia balik rumah. Dia tak nak juga, dia kata dia ada rumah sewa di Parit Sakai. Kemudian saya pun pergi ke rumah Parit Sakai pujuk dia balik, dia tak nak balik juga. Lama-lama dia telefon anak dia dan suruh anak dia pergi hospital. Dia kasi duit tambang RM25 pada anak dekat sekolah suruh dia pergi hospital besoknya. Bila saya balik kerja tengok budak tidak ada. Saya cari-cari di Parit Jawa pun tak ada, habis saya tanya pada akak ipar saya dan dia cakap nampak anak saya tunggu bas. Habis lepas itu akak ipar saya telefon ke rumah yang orang rumah saya sewa dan akak ipar bagitahu anak ada di rumah sewa orang rumah saya. Habis saya nak pergi ambil anak saya malam dalam pukul 7, sekali tengok orang rumah saya dan anak dah tak ada. Lepas itu akak ipar saya pergi ke rumah bapa dia, juga tak ada. Lepas itu akak ipar saya balik rumah dan saya buat repot di Parit Jawa mengatakan anak saya emak dia ambik tak bagitahu saya. Tak lama itu anak saya telefon saya, dia kata hari Isnin orang rumah nak bawa anak jalan bandar. Lepas itu anak saya demam, kemudian saya ada rumah, anak saya yang tua nama Zainuddin nak pergi kerja, dia cakap dengan saya emak ada rumah sebelah. Lepas itu saya pergi pujuk dia dan cakap anak sakit dan suruh dia pergi tengok. Dia pergi tengok naik rumah. Saya pun cakap dengan dia, kenapa tak balik dah lama, dan dekat tiga bulan, kitakan suami isteri, anak sudah ada dan rindukan mak. Dia cakap kita sudah lama tak serumah dan tak boleh duduk rumah ini. Saya tanya kenapa tak boleh, dia tak jawab dia hanya cakap nak cari bajunya dan terus ke dapur nak cari baju. Saya nak cium dia sekali, dia tak kasi. Saya cakap kan kita suami isteri kenapa tak kasi. Dia cakap, kita ini sebagai kawan saja. Saya cakap macam mana sebagai kawan. Lepas itu saya macam marah dan tak ingat isteri saya mahu keluar rumah pergi rumah sebelah. Dia cakap pada anak dia, dia nak ke Muar makan Kentucky. Habis saya cakap, abang pun nak ikut boleh tak. Dia cakap buat segan. Habis itu saya makin tak ada ingatan. Habis lepas tu dia pergi rumah sebelah. Habis saya ni, ingatan saya macam tak berapa anu, saya pun ambil pisau yang buat rewang nak tolong sebelah rumah abang. Fikiran saya macam tak berapa betul. Macam mana saya boleh masuk ke rumah abang saya pun saya tak tahu. Sadar-sadar saya kat hospital.

[68] When he resumed his testimony, the accused said that he gave D38 on 10 September 2001, when the incident was still fresh in his mind. No one had advised him to give a statement. His caution statement was true. The contents of his statement were not fabricated. The police did not ask for the telephone bill mentioned in D38. [The defence tendered the telephone bill for 06-9882671, which was marked as IDD39]. He enquired from Rozita on a telephone call to 019-7412027 [on 14 May 2001] that incurred a charge of RM22.00. He asked Rozita for the reason. 'Rozita jawab kalau abang telefon nombor ini, Rozita akan ikut lelaki ini lari.' That was the first time he enquired about the telephone bills, because it was too high. He did not telephone 019-7412027. 'Saya tidak berani telefon, sebab saya takut Rozita lari. Saya percaya Rozita akan lari.' Sometimes Rozita and sometimes he would settle the telephone bills. Rozita was the subscriber of telephone 06-9882671. 'Tarikh 9 Jun 2001 dibawah IDD39 ditulis oleh saya, saya takut lupa tarikh Rozita keluar rumah.' Pada 3 September 2001 saya tidak berniat mencederakan Rozita [see 97NP] Tujuan mengambil pisau bukan untuk menikam Rozita. Saya tidak cuba bunuh diri pada 3 September 2001. Semasa saya dengar Rozita kata kita bukan suami isteri lagi, sebagai suami saya rasa dayus kerana saya mampu lagi kasi nafkah batin, saya bukan ada penyakit yang tak boleh diubati, dan saya bukan mati pucuk. Semasa Rozita kata bukan suami isteri lagi, air muka Rozita

marah. Perasaan saya sedih dan terus marah. Dimasa tahu Rozita telah tinggalkan rumah, perasaan saya segan dan sedih. Hal Rozita keluar sudah jadi buah mulut orang kampong. Hari ini saya rasa menyesal. Saya tidak merancang perkara ini berlaku.' [see 97NP].

[69] Under cross-examination, the accused said that he had been married to Rozita for 21 years. Rozita was the woman in photographs P25(1 & 2). The house in P24(1) was the house of SP8. Rozita was employed and had a fixed income. Sometimes Rozita would contribute towards the household expenses. At the material time, he was a fisherman with no fixed income. 'Masalah suami isteri adalah biasa, termasuk saya. Saya setuju ada perkahwinan yang berakhir dengan cerai. Secara munasabah, cerai bukan perkara yang mustahil dalam perkahwinan saya.' The accused agreed that Rozita was an adult and had the right to decide to live on her own. However, the accused disagreed that Rozita had the right to ask for a divorce 'jika dia tidak ingin duduk bersama kamu'. The accused disagreed that the incident on 3 September 2001 was not related to the events on 9 June 2001. The accused agreed that the 'Kejadian 3 September 2001 tidak berkisar dari bil telefon IDD39'. The accused disagreed that he refused to give the telephone bill to the police who had asked for it. The accused said that the police had never asked for that telephone bill. The accused disagreed that Rozita had no relationship with a third party and or that he had made up that story. However, the accused agreed that there were no matrimonial differences before 9 June 2001. 'Di pejabat kadi Rozita mengadu saya adalah kaki judi dan kaki minum arak, dan tidak bertanggungjawab kepada rumah tangga. Rozita juga mengadu saya paksa Rozita minum Guinness Stout.' The accused disagreed that Rozita on 9 June 2001 had made it clear of her wish to be separated from him. The accused disagreed that the three months separation was a sign of the wish of Rozita to be separated. However, the accused agreed that during those three months, that Rozita had expressed, at the office of the Kadi and at the Hospital, her wish to be divorced. The accused disagreed that he harboured ill will towards Rozita when she did not return home. The accused disagreed that he only checked with Jafri as to whether Rozita was on duty on that day. The accused disagreed that he enquired about the course at Malacca only to know the movements of Rozita. The accused disagreed that Rozita had not said anything about a three month course at Malacca. He met the employer of Rozita on more than one occasion. The accused disagreed that he met the employer of Rozita only to ascertain if Rozita was on duty on that day. The accused disagreed that his meetings with Rozita at the hospital constituted a disturbance. The accused disagreed that he only met Rozita once at the hospital, before he met Rozita at the office of the Kadi. The accused disagreed with the following proposition: 'Bukan Rozita yang suruh ke pejabat Kadi, kamu yang buat aduan kepada pejabat Kadi'. The accused disagreed that after counselling, he and or with other persons met Rozita at Rozita's house at Parit Sakai with the intention to persuade Rozita to return home. The accused disagreed that he had never been to Rozita's father's house to ask for assistance from Rozita's father. However, the accused agreed that he did not inform the police that he had sought the assistance of Rozita's father. The accused agreed that Rozita also had parental rights over SP10. The accused agreed that that it was SP10 who headed off on 8 August 2001 to look for Rozita rather than that Rozita took SP10 away. He lodged his report (D37) on 8 August 2001 at about 9.30–9.45pm. The accused agreed that Rozita had telephoned and informed him that SP10 was safe with her, before he lodged D37.

The accused disagreed that SP10 only spent one night with Rozita. However, the accused agreed that the meeting at the office of the Kadi was at his request, for Rozita to hand over SP10 at the office of the Kadi. The accused disagreed that the meeting at the office of the Kadi was not to attend the second counselling session. The accused disagreed that it was not true that he was not worried when SP10 did return home for three or four nights. The accused disagreed that after the second counselling session he did not see Rozita again until 3 September 2001. However, the accused agreed that incident of SP10 not returning home had no bearing on the incident on 3 September 2001. The accused agreed that Rozita had come home on 3 September 2001 for the reason that SP10 was not well. The accused disagreed that there was no such thing about going to eat 'Kentucky' or about 'segan'. In the kitchen of his house, he tried to hug Rozita, but Rozita would not allow him to do so.

[70] The following exchange ended the cross-examination of the accused:

DPP: Masa itu, Rozita kata jangan buat begitu sebab Rozita masih ingin bercerai dengan kamu.
Saksi: Tidak setuju.
DPP: Dan selepas itu, Rozita terus pergi ke rumah SP8.
Saksi: Tak setuju, sebab saya tak nampak dia pergi ke mana.
DPP: Lepas Rozita beredar, kamu ambil P8A dan ikut Rozita ke rumah SP8.
Saksi: Tidak setuju.
DPP: Tujuan bawa pisau dan ikut Rozita bukan tujuan rewang, tetapi untuk guna terhadap Rozita.
Saksi: Tidak setuju.
DPP: Kamu sedar semasa pergi ke rumah SP8 dengan pisau.
Saksi: Tidak setuju.
DPP: Di dapur SP8, hanya ada kamu, SP8 dan Rozita.
Saksi: Tidak setuju.
DPP: Pada masa itu, Rozita berdiri ditepi pintu dapur.
Saksi: Setuju.
DPP: Rozita tidak pegang apa-apa barang.
Saksi: Setuju.
DPP: Pada masa itu, SP8 sedang panaskan nasi untuk Rozita.
Saksi: Setuju.
DPP: Kamu pergi ke Rozita dengan P8A dan kata 'abang pegang Ita tak boleh ke, Ita masih isteri abang'.
Saksi: Tak setuju.
DPP: Rozita berdiri disitu dan tidak menjawab kamu
Saksi: Setuju.
DPP: Dan kamu terus tikam Rozita sebanyak dua kali dibahagian leher dengan P8A.
Saksi: Tidak benar.
DPP: Kamu sedar semasa kamu tikam Rozita.
Saksi: Tidak.
DPP: Niat tikaman dua kali adalah pastikan Rozita mati.
Saksi: Tidak.

DPP: Saya kata, selepas tikam Rozita dua kali, kamu tikam leher kamu.
Saksi: Tidak benar.
DPP: Dan kamu juga tikam perut kamu.
Saksi: Tidak.
DPP: Setelah itu, kamu ada bangun dan hantukkan kepala ke dinding dapur.
Saksi: Tidak.
DPP: Semua yang saya cadangkan berlaku kerana kamu sedar apa yang kamu buat kepada Rozita
Saksi: Tidak.
DPP: Kamu tidak hilang ingatan atau hilang punca seperti yang kamu kata.
Saksi: Tak setuju.
DPP: Perkara mencederakan Rozita dan diri sendiri adalah sebab kamu tidak terima kenyataan Rozita ingin berpisah atau bercerai.
Saksi: Tidak.
DPP: Tujuan kamu mencederakan diri sendiri lebih sekali adalah ingin bunuh diri.
Saksi: Tidak.
DPP: Kamu cuba serah diri sebab kamu sedar apa yang telah kamu lakukan pada Rozita.
Saksi: Tidak.
DPP: Kamu tidak ada sejarah hilang ingatan atau sakit jiwa.
Saksi: Setuju.
DPP: Polis memberi peluang yang penuh kepada kamu untuk berkata apa-apa yang ingin dikatakan dalam D38.
Saksi: Setuju.
DPP: Kamu telah reka banyak perkara dalam D38.
Saksi: Tidak.
DPP: Response Rozita yang diceritakan dalam D38, Rozita yang suruh pergi ke pejabat kadi, berkenaan cari SP10, berkenaan cium yang tak beri, berkenaan dengan perkataan tak kasi, berkenaan ikut makan KFC, dan perkatakan buat segan, semua tersebut adalah direka.
Saksi: Tak setuju.
DPP: Cerita dalam D38, bahawa tidak sedar fikiran tak betul, ingatan yang tak berapa anu, pisau untuk rewang, semua perkara itu adalah rekaan.
Saksi: Tak setuju.
DPP: Di dalam mahkamah kamu pilih untuk tidak ingat perkara-perkara yang tidak memihak kepada diri kamu.
Saksi: Tak setuju.
DPP: Sebaik sahaja sebelum kejadian tikam Rozita, langsung tidak ada bangkitan marah yang besar atau mengejut oleh Rozita kepada kamu.
Saksi: Rozita tak buat apa yang membangkitkan marah saya didapur SP8.
DPP: Cerita kamu tentang perasaan dayus, adalah rekaan kamu.
Saksi: Tidak.
Saksi: Sebelum 3 September 2001, saya memang tahu Rozita ingin bercerai.
DPP: Reaksi Rozita, tidak benarkan dipeluk, adalah satu yang munasabah dan boleh dijangka dari seorang wanita yang ingin bercerai.
Saksi: Tidak setuju.

[71] Under re-examination, the accused clarified that 'Apa yang setuju tadi dengan cadangan DPP, adalah tentang kejadian didapur SP8 sebelum Rozita pergi tengok SP10'.

[72] SD2 (Jafri bin Ismail) testified that he was an executive of Syarikat Sinar Jernih, the employer of Rozita from March 2000 until the day that Rozita died. The accused, the husband of Rozita, had been to his office, to ask whether Rozita was on duty on the day that he came. On the second occasion that he came to his office, the accused asked if Rozita had to undergo a course 'di luar'. He replied that there was none. He did not inform Rozita that her husband had asked about a course 'di luar'. Rozita had a monthly salary of RM370 and a monthly allowance of RM80. No police officer approached him for his statement. Inspector Rashid came to his office and took Rozita's file.

[73] Under cross-examination, SD2 corrected himself and said that the police had not taken Rozita's file. But the police made a photocopy of the attendance card of Rozita. His company still has Rozita's file [witness produced the file]. The working hours of Rozita were from 7am to 4pm. Rozita was at work on 8 August 2001. Rozita was on leave on 9 August 2001. Rozita was at work on 10 August 2001 and 11 August 2001. Rozita gave no problems in her work. He last saw the accused in August. SD2 was not re-examined.

[74] SD3 (Mustaffa bin Ab Rahman) testified that he was the unit head of TM Point, a subsidiary of Telekom Malaysia at Muar. Telephone 06-9882671 was registered in the name of Rozita bte Haron of Lot MBP 351 Kampong Parit Pecah, 84160 Parit Jawa Muar. D40 is the computer record of the telephone bill for 06-9882671 for May 2001. Under cross-examination SD3 said that 06-9882671 was a fixed phone line, for a house telephone. SD3 was not re-examined.

[75] SD4 (Mohamad Hamzan bin Sayuti) testified that he was attached to the Religious Department and worked as a 'Pegawai Rundingcara dan Khidmat Nasihat sejak Mac 2001'. He got to know the accused after attending a counselling session held on 11 June 2001. 'OKT membuat aduan berkenaan dengan masalah isteri keluar rumah.' D41 dated 11 June 2001 was one of the complaints he recorded. D42 was the record of the counselling. He could not be certain if Rozita had asked for a divorce. There was only one counselling session.

[76] Under cross-examination, SD4 said that a counselling session was held on 29 June 2001 at the request of the accused. The accused and Rozita were before him on 29 June 2001. Rozita denied the allegations of the accused. Rozita presented evidence of her contributions to the family. Rozita alleged that the accused was a gambler. 'OKT meminta Rozita minum guinness stout jikalau tidak datang bulan, dan semuanya dirakam dalam D42.' During counselling, the accused did not deny the allegations of Rozita. The accused remained silent. It was clear to him during counselling that Rozita did not want to return to the accused. The accused wanted Rozita to return home. 'Sesi resmi adalah satu, tetapi ada perjumpaan lain dipejabat saya, tarikh tak ingat, tetapi lepas 29 Jun 2001. Setahu saya, Rozita tidak mahu balik

ke OKT. Perkara itu jelas pada sesi Rozita dan OKT ada dihadapan saya. Rozita serik berbalik ke OKT.' SD4 was not re-examined.

[77] Learned counsel then applied and was granted leave to further cross-examine SP12 on the last 5 lines of the caution statement (D38).

[78] Under further cross-examination, SP12 said that he read D38 and investigated on the statement 'habis itu saya makin tak ada ingatan, habis lepas itu dia pergi rumah sebelah, habis saya ini ingatan saya macam tak berapa anu' of the accused. 'Saya ada siasat ke atas OKT. Saya ada siasat di hospital pada petang 10 September 2001. Di hospital Muar saya bertanya pihak hospital, iaitu bahagian rekod perubatan sama ada OKT pernah terima rawatan sakit jiwa atau ada hilang ingatan. Saya juga telah buat temubual ke atas OKT dan dapati dari OKT bahawa OKT tidak pernah mendapat apa rawatan hilang ingatan. Siasatan di atas tidak dirakam dalam diari saya. Saya siasat di bahagian rekod perubatan dan tidak catat nama pegawai rekod tersebut.'

[79] Under further re-examination, SP12 said 'Saya ada pergi dan siasat dipejabat rekod perubatan. Hasil siasatan adalah negatif. Kali pertama saya berjumpa OKT adalah pada 3 September 2001 jam 3 petang. Saya dapati OKT pada ketika itu ada dalam keadaan normal dan tidak tunjuk hilang ingatan. Pada 3 September 2001, OKT ada terima rawatan di hospital dan tidak ada rekod menyatakan OKT hilang ingatan.'

[80] Mohd Zainuddin bin Ab Razak (SD5) affirmed that he was a General Helper at Exclusive Heritage (M) Sdn Bhd of Taman Serdang Raya, 43300 Sri Kembangan, Selangor, and that he lived on his own–'Saya duduk di alamat saya'. The accused is his father. 'Pada pukul 7 pagi 3 September 2001, saya berada di rumah MBP 351, Parit Pecah, Parit Jawa Muar.' The police took his statement on the events in his house. 'Pada 3 September 2001, saya duduk di rumah ayah. Pada 3 September 2001 ibu telah lama tidak duduk di rumah ayah. Saya tahu ibu tidak duduk di rumah ayah sebab saya duduk di rumah ayah. Ibu tidak duduk sama dengan ayah sebab ibu ada krisis dengan ayah. Ayah dan ibu selalu bergaduh dan berselisih faham, sebab ada panggilan dari luar kepada ibu.' He had no knowledge if there were indeed such telephone calls. He answered three or four calls from an unknown person to Rozita. The caller sounded like he was a Bangladeshi. 'Saya ada beritahu ayah saya. Ayah saya tak cakap apa-apa. Saya tak pernah nampak ayah pukul ibu. Saya tak pernah nampak ibu pukul ayah. Saya nampak ayah yang mengalah dalam pergaduhan.' On 3 September 2001, he woke up at 7am. [The night before,] he slept in the hall, as did the accused and SP10. When he woke up, his father was still asleep. He prepared himself to go to work. He heard Rozita's voice from SP8's house. After his bath, he informed the accused that Rozita was in SP8's house. 'Saya berselisih dengan ibu di tepi rumah. Saya tidak cakap apa-apa dengan ibu. Ibu soal sama ada saya nak pergi kerja ke. Saya tidak jawab, sebab saya tak berapa suka dengan ibu saya. Saya keluar rumah ikut pintu tengah sebab saya hendak elak jumpa ibu saya. Semasa selisih dengan ibu, ibu menuju ke pintu belakang rumah Mak Cik Rokiah. Semasa saya memberitahu ayah, ayah berada di ruang tamu. Saya memberitahu dengan ayah. Ayah sudah sedar, adik masih juga di dalam ruang

tamu. Adik demam, dan tidak pergi ke sekolah. Semasa saya memberitahu ayah, ibu ada di sebelah, saya tidak lihat wajah ayah. Ayah tidak jawab apa-apa. Pada 3 September 2001, saya berada ditempat kerja, iaitu Jalan Sayang, Muar pada sebelum pukul 9 pagi. Saya guna bas awam. Selepas saya sampai di tempat kerja, saya dapat panggilan telefon dari Pak Cik Yusof menyatakan ada kemalangan di rumah. Saya terus pulang ke rumah ayah. Sebelum 3 September 2001, saya pernah mencari ibu, ikut ayah.'

[81] Under cross-examination, SD5 said that even before his appearances in court on 17 August 2005 and 15 November 2005, he was no longer staying in his village, and that he had not left his address where he could be contacted with any one member of his family. 'Tetapi saya ada tinggal nombor telefon bimbit dengan adik.' SD5 agreed that in March 2005, SP10 could not reach him on his mobile phone. SD5 agreed that he had not left any address or telephone number where he could be contacted with the police. SD5 agreed that on 3 September 2001 he was not in the house of the accused when Rozita was there.

DPP: Saya kata, pada 3 September 2001 kamu tidak berada dirumah semasa ibu berada dirumah ayah.

Saksi: Setuju

[82] SD5 disagreed that he was never in the house of the accused on the morning of 3 September 2001, that his testimony on the quarrels was twisted in favour of the accused, that he had never been with the accused in search of Rozita, that his testimony of him having received three or four calls from a Bangladeshi was a fabrication, or that there was no truth in his story that he (SD5) informed the accused about those telephone calls. SD5 was not re-examined.

[83] At the close of the entire case, Mr Balaguru also made a fleeting reference to *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 and then submitted along the following lines. The charge must be proved beyond doubt. An exception to s 300 must be proved on a balance of probabilities (counsel cited *Public Prosecutor v Lim Eng Kiat* [1995] 1 MLJ 625 at held No 3). The defence is exception 1. Provocation caused doubt as follows. The deceased had left the matrimonial home. Efforts were made by accused to bring deceased home. On the morning of the day in question, the deceased appeared unannounced. Accused was happy to see the deceased. Accused became sad when deceased declined to see SP10. Accused was provoked by remarks made by deceased that they were no longer husband and wife, but only friends. Deceased refused accused's advances to embrace and kiss her. That provoked the accused to lose self-control. There must be intention to cause death. There was no evidence of intention. There must be evidence of acts preparatory, evidence of pre-meditation. No evidence to prove intention to kill. Accused had given oral evidence to bring himself within exception 1 on the basis of the following. SP8, SP10 and SP11 all testified to the strained relationship between accused and deceased. In *PP v Lim Eng Kiat*, the court defined grave and sudden provocation. *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251, at p 253 also expounded on grave and sudden provocation. There was no evidence that the accused planned the attack as would deprive him of exception 1. Evidence of accused begins at p 83NP. At p 84NP,

the accused said that the deceased left after he found that the telephone bills were high. Accused testified that Rozita threatened to follow that 'guy' should he (accused) call that number. Telephone bills were found out on 9 June 2001. The accused found that deceased was not in Malacca; there was no course held in Malacca as related by deceased. Deceased left home on 9 June 2001. Accused did not deny or admit to the killing. The court found there was a case to answer. If unanswered, conviction must follow. Whilst the accused did not admit the act, the court found as a matter of fact that accused did the act. The court should consider exception 1 in light of the defence. Has murder been proved beyond reasonable doubt? Whilst the accused did not admit or deny the act, yet the accused adduced evidence of a series of events/words that caused him to lose self-control. A series of cumulative events could amount to grave and sudden provocation (counsel cited *Public Prosecutor v Lasakke* [1964] MLJ 56). Likewise, the series of events in instant case caused the accused to be provoked and resulted in him losing self-control. The history of relationship is relevant to defence. The accused was happy and sad, on the same day. His emotions were like a yo-yo, up and down. The defence was consistent with the caution statement (D38). The prosecution had not rebutted the story that the accused lost control or could not think after he heard the deceased saying that there were no longer husband and wife. The defence was that the accused lost his mind. The accused was a witness of truth. The caution statement was supported by D36 & D37, D39 and D40. According to the first information report, there was a fight between husband and wife. The police failed to trace that caller. As a result, the defence could not summon that witness who could shed light. Section 114(g) of the Evidence Act should be invoked. SP11 said there was a quarrel, but P26 stated that there was a fight. A quarrel is consistent with the defence of provocation. SP8 heard accused saying 'abang pegang Ita pun tak boleh ke, kan Ita masih isteri abang'. Those words supported the defence of provocation, the continued application of provocation. The police should have investigated on the fight as reported in P26, and on whether it was indeed a fight. The accused's possession of P8A was for a legitimate purpose, to dismantle the temporary shed. There was no evidence that the accused took P8A and then chased after deceased. SP8 and SP11 related the events, and the court could infer that the 'acta' was caused under circumstances falling within exception 1. Without proof of intention, the defence need not even resort to exception 1. There was no case under s 302, only a case under s 304 of the Penal Code.

[84] The learned DPP submitted that the court must find if the case had been proved beyond reasonable, if an exception had been proved on a balance of probabilities, and or if there is a reasonable doubt. The intention to kill must be inferred from the facts and circumstances, in particular from the nature of the injuries (DPP cited *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174). The injuries on the deceased were not self-inflicted, and were to the neck. The weapon belonged to the accused. SP10 confirmed that P8A belonged to the accused. The accused also admitted that P8A belonged to him. SP11 took P8A from the hand of accused. During the incident, there were only three persons present, namely accused, SP8 and deceased. It could be inferred that it was the accused who committed the act. It could also be inferred that there was the intention to kill, from the injuries and by the fact that P8A was taken to the scene by the accused. As to whether it was a quarrel or fight, it was settled by the testimony of SP8. The first information report was only

A evidence of a telephone call from the public. P26 was not any evidence of the factual content. Whilst SP8 was under cross-examination, it was not suggested that there was a quarrel or fight. It is too late to suggest that there was a fight or quarrel (DPP cited *Lim Lian Chen v PP* [1992] 1 CLJ 285). The defence must give notice of an exception. There is no such thing as a series of provocation to be accumulated and
B therefore to amount to grave and sudden provocation. The deceased left home about three months before the incident. SP8 and SD4 testified that the deceased had no intention to return. The words by the deceased that she could not return, and the deceased's rejection of the accused, were not any sudden and or grave provocation. There was no fight for three months prior to the incident, except for the
C communication by the deceased to the accused that she wanted a divorce. The accused knew that the deceased had rejected him. Rejection was nothing new and was not new on the day in question. three months was a sufficient period to cool off. The telephone bills were not raised during the prosecution case. In relation to exception 1, the accused himself admitted that deceased had done nothing to
D provoke him (DPP referred to 108NP and 105NP). As matter of fact, the accused denied the act, and since the act was denied, there could not be a case falling within exception 1. In any event, to be within exception 1, the accused must say that he was provoked and that he lost control (DPP cited *Chong Teng v PP* [1960] MLJ 153). *Public Prosecutor v Awang Raduan bin Awang Bol* [1998] 5 MLJ 460 which was affirmed in *Public Prosecutor v Awang Raduan Awang Bol* [2005] 1 CLJ 649, held that
E exception 1 must be proved on a balance of probabilities. Even if provoked, the retaliation cannot be out of proportion (DPP cited *Vijayan v Public Prosecutor* [1975] 2 MLJ 8). It is not conceded that the deceased said 'kita bukan suami isteri, kawan sahaja'. But even had she said so, it was not any grave and sudden provocation. Matrimonial differences are common. Whatever happened [between Rozita and
F accused] would not provoke a 'reasonable man'. There was no reason to retaliate, if at all it was to retaliate, in the manner that the accused did, to kill. The deceased was unarmed. The deceased was quiet. Therefore, the deceased could not have provoked the accused. If at all the deceased said 'kita bukan suami/isteri', it was said in the house of the accused, and there was an interval of time before the incident. There was a cooling off period, if the accused were provoked in the first place. If the accused
G took P8A to bring down the shed, then why had he proceeded to SP8's house? That was not explained by the accused. Since exception 1 was relied upon, then the act must be conceded and or admitted. All issues on the telephone bills, 'anak makan Kentucky', 'deceased memanggil lelaki lain', were not raised during the prosecution case, and were an afterthought. D38 is evidence, but it must be looked at in the
H totality of the evidence. It was strange that the accused could remember remote events but not that which were still fresh. Even in D38, the accused did not state that he lost self-control. In court, the accused never said he lost self-control. The exception had not been proved. There is no doubt to the prosecution case.

I **[85]** In his reply, Mr Balaguru stressed that whatever the accused had agreed with the learned DPP was in the context of the events before Rozita proceeded to the house of the accused to see SP10.

[86] On the facts, it should be self-evident that the only possible exception is exception 1, which provides that 'a culpable homicide is not murder if the offender,

whilst deprived of the power of self-control by grave and sudden provocation, causes death of the person who gave the provocation, or causes the death of any other person by mistake or accident'.

Ratanlal & Dhirajlal, at pp 1327–1328 carries the following commentary on exception 1:

> It is well established that Exception I to section 300 can apply when the accused is shown to have deprived of power of self-control by grave and sudden provocation which is caused by the person whose death has been caused.
>
> It is not each and every provocation that will reduce the crime from murder to culpable homicide not amounting to murder. The provocation must be both gave and sudden. In order to invoke the benefit of the exception, it must be established that the act committed by the accused was a simultaneous reaction of grave as well as sudden provocation which deprived him of the power of self-control. If the provocation is grave but not sudden, the accused cannot get the benefit of this exception. Likewise, he cannot invoke the exception where the provocation though sudden is not grave.
>
> When the derangement of the mind reaches that degree that the judgment and reason cease to hold dominion over it their authority being suspended and yielding place to violent and ungovernable passion–the man who was before a rational being is no longer the master of his own understanding becomes incapable of cool reflection and ceases to have control over his passions. It is to such a state of mind that the law in judging of facts which cause death, gives indulgent consideration. And no mental perturbation or agitation which falls short of this, and leaves way to reason and the power of self-control can reduce a murder to an offence within the range of this mitigating exception. Terror or fear, no less than anger, may deprive a man of power of self-control.
>
> In cases of this kind, the immediate object of the inquiry is, whether the suspension of the reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given; for if, from any circumstance whatever, it appears that the party reflected, deliberated or cooled down any time before the fatal stroke was given, or if, in level presumption, there was time or opportunity for cooling, the killing will amount to murder as being attributable to malice and revenge, rather than to human frailty'.

In *Mancini v Director of Public Prosecutions*, Viscount Simon observed:

> It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprive the person provoked of the power of self-control as the result of which be commits the unlawful act which causes death … The test to be applied is that of the effect of the provocation on a reasonable man, so that an unusually excitable pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for the retort, in the heat of passion induced by provocation, by simple blow, is a very different thing from making use of deadly instrument like to concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.

In order to bring the case within exception 1, the following conditions must be complied with:

(i) The deceased must have given provocation to the accused;

(ii) The provocation must be grave;

(iii) The provocation must be sudden;

(iv) The offender, by reason of the said provocation, shall have been deprived of his power of self-control;

(v) He should have killed the deceased during the continuance of the deprivation of the power of self-control; and

(vi) The offender must have caused the death of the person who gave the provocation or that of any other person by mistake or accident

In other words, before exception 1 can be invoked, the accused must establish the following circumstances:

(i) there was a provocation which was both grave and sudden;

(ii) such provocation had deprived the accused of his power of self-control; and

(iii) whilst the accused was so deprived of his power or self-control, he had caused the death of the victim.

[87] 'Being an exception, the burden of proving the circumstances covered by exception 1 is on the accused. Where the prosecution prima facie proves the act was committed by the accused which had resulted in the death of the deceased, and the accused pleads that the case falls within one of the exceptions, it is for him to prove that... It is for the accused who seeks to reduce the nature of his crime by bringing the case under exception 1, to prove that the provocation received by him was such as might reasonably be deemed sufficient to deprive him of self-control, and that the act of killing took place whilst that absence of control was in existence and may reasonably be attributed to it' (*Ratanlal & Dhirajlal*, at p 1344). ' … the matter must be considered objectively and that the burden is on the accused to establish provocation on a balance of probabilities' (*Vijayan v Public Prosecutor* [1975] 2 MLJ 8; [1975–1977] 1 SLR 100). '… when the onus of proof is on the accused (for example, where he raises the defence of insanity, or where some statute puts the onus on him) … he need satisfy the jury only on the balance of probabilities' (*Ng Eng Kooi & Anor v Public Prosecutor* [1970] 1 MLJ 267). 'It could not be gainsaid that the defence of grave and sudden provocation is a special exception as provided in exception 1 to s 300 of the Penal Code. The burden of proof is explained in s 105 of the Evidence Act 1950 which provides … the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any of the special exception or proviso contained in any part of the same Code, or in any law defining the offence, is upon him, and the court shall presume in the absence of these circumstances …. Based on the above cited case authorities, it is clear that the threshold where the appellant in the present case must satisfy the court is on the balance of probabilities that the injuries that he had inflicted on the two deceased persons were as a result of grave and sudden provocation and not merely to cast a reasonable doubt on the prosecution case (*Bala Anak Matik v Public Prosecutor* [2006] 3 MLJ 516 per Zulkefli JCA). ' … the court has to regard the absence of grave and sudden provocation until the contrary is proved by the accused on whom the onus lies (see *R v Upendra* 19 CWN 653; *Pasadi Verabbayi v State of Andhra Pradesh* 1984 Cri LJ 440)' (*Public Prosecutor v Kenneth Fook Mun Lee (No 2)* [2003] 3 MLJ 581 per Augustine Paul J (as he then was)).

[88] 'The provocation must have come from the victim. If the provocation has not been given by the deceased, the exception does not apply and the accused cannot claim the benefit of the exception (*Ratanlal & Dhirajlal*, at p 1342). To put it simply, any provocation must necessarily be founded on the words and or acts of Rozita.

[89] Culled out from the testimony of the accused, Rozita allegedly said or did the following. On 3 September 2001, Rozita had left the matrimonial home for about three months. On 9 June 2001, Rozita lied about a three week course at Malacca and then left the house. Rozita left when the accused enquired about the high telephone bill that was uncovered on 9 June 2001. When the accused enquired about a telephone call to 019-7412027 that incurred a charge of RM22, Rozita said 'kalau abang telefon nombor ini, Rozita akan ikut lelaki ini lari.' About two or three weeks after 9 June 2001, the accused met Rozita at the Muar General Hospital. Rozita refused to return home. 'Rozita cakap dia hendak tenangkan fikiran.' About 2 or three days later, the accused and SP10 met Rozita at the Muar General Hospital. Rozita again refused to return home. When the accused said to Rozita that their son was asking for her, Rozita answered she was busy. On the third attempt by the accused to persuade Rozita to return home, Rozita asked both parties to go to the office of the Kadi. Rozita asked for a divorce. About two or three weeks later, at the counselling session conducted by the office of the Kadi, Rozita informed Ustaz Mohamed Ramzan bin Sayuti that the accused was a gambler, a drinker, and an irresponsible person. Those allegations were not true. In the presence of the Ustaz, the accused asked Rozita to return home. Rozita informed the Ustaz that she did not want to return home. Outside the office of the Kadi, Rozita informed the accused that she was staying in a rented house in Parit Sakai. The accused asked Rozita to return home for the sake of SP10. Rozita again refused to return home. Sometime during the next 14 days, the accused met Rozita in Parit Sakai. Rozita again refused to return home. 'Tiap-tiap kali Rozita enggan balik saya rasa sedih. Saya tidak rasa marah sebab tak sampai hati.' Thereafter, the accused did not see Rozita again until 3 September 2001. Meantime, Rozita kept in touch with SP10 through the telephone. One day, the accused found that SP10 was not at home. SP8 informed the accused that SP10 was with Rozita. Rozita took SP10 away without the knowledge of the accused. The accused then met Rozita and SP10 at the office of the Kadi. After counselling, the accused took SP10 home. When the accused asked SP10 about his activities over the past three or four days, SP10 replied 'Rozita bawa jalan-jalan.' On the second occasion before the Kadi, the accused asked Rozita to return home. Rozita did not want to return home. Rozita asked for a divorce. On 3 September 2001, Rozita came to SP8's house. The accused went over to SP8's house. In the kitchen of SP8, the accused asked Rozita to go and see SP10 who was not well. Rozita kept quiet. The accused went back to his house. Rozita then came over to the house of the accused. 'Rozita tidak beri salam.' Rozita sat near the main door, near SP10. Rozita spoke to SP10. Rozita said she wanted to take SP10 to eat 'Kentucky'. 'Rozita tidak sentuh badan SP10.' The accused said to Rozita that he would like to follow. 'Rozita tidak jemput saya ikut. Rozita cakap buat segan sahaja. Saya dapati maksud Rozita adalah saya tidak malu. Rozita cakap di hadapan SP10.' The accused asked Rozita to return home, but Rozita said she had rented premises. Rozita proceeded to the kitchen to take her clothing. The accused followed.

[90] According to the accused whilst under examination-in-chief, the events that transpired thereafter were as follows. 'Di dapur saya kata lagi saya hendak pergi ikut makan Kentucky, Rozita kata buat segan sahaja. Saya kata, apa segan, sedangkan kita suami isteri. Rozita diam sahaja. Lepas itu saya cuba pegang dan cium Rozita tetapi dia tak kasi, Rozita elak. Apabila Rozita elak, saya tidak cakap apa-apa. Perasaan saya marah, sebab tak kasi cium. Rozita tak bagi alasan mengapa tak kasi cium. Lepas itu Rozita tak ambil baju. Rozita terus turun tangga rumah. Sebelum turun Rozita tidak kata apa-apa kepada SP10. Semasa Rozita turun tangga, saya berdiri ditempat pintu. Saya tengok dia turun. Sudah tiba dibawah Rozita kata 'sekarang kita bukan suami isteri lagi, kita cuma sebagai kawan sahaja'. Saya tidak setuju dengan apa yang dikata oleh Rozita, sebab Rozita masih isteri saya (see p 93 of the NP). Saya faham kata Rozita sebagai tiada hubungan lagi. Perasaan saya macam hilang fikiran, dan hilangan ingatan. Saya tidak terima hakikat kata Rozita kerana dia masih isteri saya. Saya masuk ke rumah ambil pisau untuk potong dawai bangsal. P8A ini adalah pisau yang saya ambil. Saya ambil pisau itu dari dalam bilik tidur saya. Saya simpannya di dalam bilik tidur saya, sebab takut budak buat main. Saya ambil P8A untuk tujuan memotong dawai bangsal. Dengan pisau, saya turun rumah. Fikiran saya bingung dan hilang ingatan. Dengan pisau saya pergi ke rumah SP8. Lepas itu saya tak ingat, saya sedar saya berada di hospital sahaja (see p 94 of the NP). Bila saya sedar, saya dapati saya berada di hospital. Saya bertanya misi mengapa berada di hospital. Misi kata saya ada luka dileher. Saya berada di hospital dalam dua hari, ada polis yang datang. Masa saya sedar, saya dapati saya sedang digari di katil. Lepas hospital, polis bawa saya ke balai polis Parit Jawa. Polis dari Muar datang dan mengambil statement saya. Saya memberi statement semasa di balai Parit Jawa dan juga di balai Muar'.

[91] Some of the facts asserted by the accused were substantiated by SD3 and or SD4. There were indeed numerous telephone calls from 06-9882671 to 019-7412027 (see D40), and a call that incurred a charge of RM22.00. There was indeed a complaint by the accused on 11 June 2001 to the Kadi 'berkenaan dengan masalah isteri keluar rumah' (see D41). There was indeed a counselling session on 29 June 2001 (see D42). However, SD4 also testified that Rozita denied the allegations of the accused, that Rozita presented evidence of her contribution to the family, that Rozita alleged that the accused was a gambler, that Rozita said 'OKT meminta Rozita minum guinness stout jikalau tidak datang bulan', that the accused did not deny the allegations of Rozita and remained silent, and that Rozita did not want to return to the accused. But the following facts were admitted by the accused whilst under cross-examination. There were no matrimonial differences before 9 June 2001. At the office of the Kadi and also at the Hospital, Rozita expressed her wish to be divorced. Rozita also had parental rights over SP10. It was SP10 who headed off on 8 August 2001 to look for Rozita rather than that Rozita took SP10 away. Rozita telephoned and informed the accused that SP10 was safe with her, before the accused lodged D37. The accused requested for a meeting at the office of the Kadi for Rozita to hand over SP10 at the office of the Kadi. The incident of SP10 not returning home had no bearing on the incident on 3 September 2001. Rozita came home on 3 September 2001 for the reason that SP10 was not well. In the kitchen of his house, the accused tried to hug Rozita who rebuffed his advances. The accused has no history of any mental disorder or lapse of memory — 'sejarah hilang ingatan atau sakit jiwa'.

[92] Putting everything together, it was therefore the defence story that there were no matrimonial differences before 9 June 2001, but on 9 June 2001 Rozita made an excuse and left the matrimonial home when the accused uncovered the telephone bill for May 2001 and enquired about a call to telephone 019-7412027. On 9 June 2001, Rozita was supposed to have said 'kalau abang telefon nombor ini, Rozita akan ikut lelaki ini lari'. On 9 June 2001, Rozita was also supposed to have said that she had a three week course at Malacca. That defence story had the basis of some nascent facts. It was proved that Rozita could not have had a three week course at Malacca, that Rozita left the matrimonial home on 9 June 2001, and that, as said, several calls were made from the telephone registered in Rozita's name to telephone 019-7412027. Nevertheless, it did not automatically follow that therefore Rozita must have said 'kalau abang telefon nombor ini, Rozita akan ikut lelaki ini lari'. But for the sake of argument, let it be accepted that Rozita indeed said those words on 9 June 2001. That would mean that Rozita was in touch with someone, that Rozita on 9 June 2001 lied about a three week course at Malacca, and that Rozita on 9 June 2001 left the matrimonial home without reason. But if those words and acts of Rozita could have provoked the accused, then it would have been some three months before 3 September 2001, some three months before the act in question. Provocation must also be sudden. 'In order to bring the case under exception 1, the accused has to establish not only that the provocation was grave but it was also sudden. The word 'sudden' involves two elements. Firstly, the provocation must be unexpected. If an accused plans in advance to receive a provocation in order to justify the homicide, the provocation cannot be said to be sudden. Secondly, the interval between the provocation and the homicide should be brief. If a man giving the provocation is killed within a minute after the provocation, it is a case of sudden provocation. If the man is killed six hours after the provocation, it is not a case of sudden provocation. When it is said that the provocation should be sudden, it is implied that it must have immediately preceded the act in question. A person may by repeated or continuous provocation arouse another to state of mind when the provocation immediately preceding the act is only the last straw' (*Ratanlal & Dhirajlal*, at p 1331). Suffice it to say that the events on 9 June 2001 were too far back and therefore too remote to constitute sudden provocation, if even they constituted provocation in the first place.

[93] The same could be said of the other events before 3 September 2001. The refusals by Rozita to return home were communicated in June/July of 2001, some two or three months before the act in question. The request for a divorce was made in June/July of 2001, some two or three months before the act in question. The allegations by Rozita to the Ustaz that the accused was a gambler, a drinker, an improvident husband and so forth were made at the end of June 2001, some two months before the act in question. The incident about SP10 not coming home occurred on 8 August 2001, about a month before the act in question. Quite clearly, there was a significantly long interval between those events and the act in question. The refusals to return home, the request for a divorce, the allegations to the Ustaz, and the incident on 8 August 2001, could not amount to sudden provocation, if even they constituted provocation in the first place. In any case, after 8 August 2001 or thereabout, the accused did not see Rozita again until 3 September 2001, ie until the fateful day. In the interim, Rozita could not have caused any provocation of any sort to the accused. Given that there was a break in contact for about a month, there was

no merit in the submission that there was the application of continuous provocation from 9 June 2001 to the fateful day. Whatever provocation that preceded, if at all, should have gone cold by the time the accused saw Rozita on 3 September 2001. In short, the events that preceded 3 September 2001 could not constitute sudden provocation.

[94] As for the events on 3 September 2001, all that Rozita allegedly said or did were the following: (i) kept quiet when the accused asked her to see SP10 who was not well; (ii) turned down the accused's request to join Rozita and SP10 in their intended outing to a fast food outlet; (iii) again declined the accused's invitation to return home; (iv) kept quiet when the accused said 'apa segan, sedangkan kita suami isteri'; (v) refused to allow the accused to hug and kiss her; and (vi) said at the bottom of the stairs 'sekarang kita bukan suami isteri lagi, kita cuma sebagai kawan sahaja'. It should be noted that all those alleged words and acts of Rozita were said and done in the house of the accused, some 5–10 minutes (see 16NP) before the accused entered the kitchen of SP8 after Rozita, and therefore, at least some 5–10 minutes before the act in question. It should also be noted that there was no evidence that Rozita said or did anything whilst she was in the kitchen of SP8 just before the act in question, other than stand beside the kitchen door with the accused. However, it was in evidence that whilst the accused and Rozita were at the kitchen door, the accused said in a normal tone 'abang pegang Ita tak boleh ke, kan Ita masih isteri abang' (see 16NP and 32NP). It was not in evidence, but it was suggested by the defence that Rozita replied 'kita kawan sahaja, bukan suami isteri' (see 33NP). Be that as it may, SP11 testified that he heard voices quarrelling loudly in his house but he paid no attention as he had gotten used to the quarrels between accused and Rozita (see 39NP).

[95] In so far as the accused was concerned, he had naught to say about the events at the kitchen door — 'Sudah tiba di bawah, Rozita kata, 'sekarang kita bukan suami isteri lagi, kita cuma sebgai kawan sahaja'. Saya tidak setuju dengan apa yang dikata oleh Rozita, sebab Rozita masih isteri saya. Saya faham kata Rozita sebagai tidak hubungan lagi. Perasaan saya macam hilang fikiran, dan hilangan ingatan. Saya tidak terima hakikat kata Rozita kerana dia masih isteri saya. Saya masuk ke rumah ambil pisau untuk potong dawai bangsal. P8A ini adalah pisau yang saya ambil. Saya ambil pisau itu dari dalam bilik tidur saya. Saya simpannya di dalam bilik tidur saya, sebab takut budak buat main. Saya ambil P8A untuk tujuan memotong dawai bangsal. Dengan pisau, saya turun rumah. Fikiran saya bingung dan hilang ingatan. Dengan pisau saya pergi ke rumah SP8. Lepas itu saya tak ingat, saya sedar saya berada di hospital sahaja. Bila saya sedar, saya dapati saya berada di hospital' (see 94NP). In the upshot, the accused had said naught to establish, and hence could not have established, that provocation had deprived him of his power of self-control, and that whilst he was so deprived of his power or self-control, he had caused the death of Rozita. To begin with, there was not even a simple statement from the accused that he lost his power of self-control. In relation to self-control, the only statements from the accused was that he felt he had lost his mind and or memory (Perasaan saya macam hilang fikiran, dan hilang ingatan) when Rozita said 'sekarang kita bukan suami isteri lagi, kita cuma sebagai kawan sahaja', and that his thinking was confused and or his mind was absent when he went to SP8's house with the knife

(Saya ambil P8A untuk tujuan memotong dawai bangsal. Dengan pisau, saya turun rumah. Fikiran saya bingung dan hilang ingatan. Dengan pisau saya pergi ke rumah SP8). To recapitulate, ' … before exception 1 can be invoked, the accused must establish the following circumstances; (i) there was a provocation which was both grave and sudden; (ii) such provocation had deprived the accused of his power of self-control; and (iii) whilst the accused was so deprived of his power or self-control, he had caused the death of the victim.' (*Ratanlal & Dhirajlal*, at p 1328). But there was not even a bare statement from the accused that his state of mind, be it in whatever condition, had deprived him of his power of self-control. There was not even a bare statement from the accused that whilst he was so deprived of his power of self-control he had caused the death of Rozita. There was not even a bare statement from the accused to such effect or could be construed to such effect. In a word, the accused had not even begun to establish circumstances (ii) and (iii) to invoke exception 1, even if grave and sudden provocation were established.

[96] Anyway, could the words and acts of Rozita on 3 September 2001 cause provocation that was grave and sudden? 'It is well settled that exception 1 to s 300 may apply only when the accused is shown to have been deprived of the power of self-control by grave and sudden provocation. It is, therefore, important to consider whether sufficient time had elapsed since the provocation to allow a reasonable time to cool down. It is not necessary that the act of the accused must immediately follow the provocation. At the same time, it must be shown that the act was done under the impulse of provocation. The fatal blow should be clearly traced to the influence of passion arising from the provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation. No hard and fast rule can be laid down as to when a person can be said to have had time to cool down so as to deprive him of the benefit of the exception. It depends on the facts and circumstances of each case' (*Ratanlal & Dhirajlal*, at p 1339). Given that there was an interval of 5–10 minutes between the events in the house of the accused and the act in question, a time gap long enough for any passion to cool down, and for reason to interpose, it would not appear at all that the act in question was done under the immediate impulse of provocation.

[97] But again, for the sake of argument, let it be accepted that the events on 3 September 2001 constituted provocation and that the act was done under impulse. It yet remained to be established that the provocation was grave. The defence of provocation would succeed if the provocation were so grave and sudden that the defendant was deprived of his power of self-control and the means he used to retaliate were reasonable in view of the provocation offered. The provocation must be sufficient to deprive a reasonable man of his self-control and the test to be applied is that of the ordinary man of the community in Brunei from which the defendant comes, in this instance the Chinese community (*Public Prosecutor v Lim Eng Kiat* [1995] 1 MLJ 625). 'To succeed in a defence of grave and sudden provocation, it is necessary in law for the defence to satisfy the court that not only by the act of the deceased that the accused had been deprived of the power of self-control but such acts of provocation would also have deprived a reasonable man of the power of self-control' (*Ikau Anak Mail v Public Prosecutor* [1973] 2 MLJ 153). 'A bare statement by the accused that he regarded the provocation as grave will not be

accepted by the court. The court has to apply an objective test for deciding whether the provocation was grave or not. A good test for deciding whether the provocation was grave or not is this: 'Is a reasonable man likely to lose self-control as a result of such provocation'. If the answer is in the affirmative, the provocation will be classed as grave. If the answer is in the negative, the provocation is not grave. In this context, the expression 'reasonable man' means a normal or average person' (*Ratanlal & Dhirajlal*, at p 1329). 'It is an established principle of law that the test of grave and sudden provocation is whether a reasonable man belonging to the same class of society as the accused, placed in the situation in which the accused was placed, would be provoked as to lose his self-control. No abstract standard of reasonableness can be laid down. What a reasonable man would do under the circumstances depends upon the customs, manners, way of life, traditional values, etc — in short, the cultural, social and emotional background of the society in which the accused belongs. It is for the court to decide in each case having regard to all the relevant circumstances' (*Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251, at p 253, see also *Che Omar bin Mohd Akhir v Public Prosecutor* [1999] 2 MLJ 689). But what was so grave about the words and or acts of Rozita, be it in the house of the accused or in the kitchen of SP8, on 3 September 2001? To take the events of 3 September 2001 from the beginning, the silence of Rozita when asked by the accused to go and see SP10 who was not well, only caused the accused to feel sad — 'Saya rasa sedih apabila Rozita tidak melayan permitaan saya untuk Rozita tengok SP10.' The refusal of Rozita to allow the accused to join in the intended outing to a fast food outlet only caused the accused to again feel sad — 'Rozita tidak jemput saya ikut. Rozita cakap buat segan sahaja. Saya dapati maksud Rozita adalah saya tidak malu. Rozita cakap di hadapan SP10. Saya rasa sedih, semasa dia kata segan.' The accused did not say what his feelings were when Rozita refused on 3 September 2001 to return home. But the refusal by Rozita to return home was old hat, and moreover was certainly not of the 'nature as to deprive the accused of the power of self-control (see *Ratanlal & Dhirajlal*, at p 1329). The refusal of Rozita to allow the accused to hug and kiss her only caused the accused to feel angry — 'Lepas itu saya cuba pegang dan cium Rozita tetapi dia tak kasi, Rozita elak. Apabila Rozita elak, saya tidak cakap apa-apa. Perasaan saya marah, sebab tak kasi cium'. Up till that point, the words and acts of Rozita only caused the accused to feel sad and or angry. In truth, there was nothing grave in any of those words or acts that would have aroused a person's passion to the point of the loss of self-control. Incidentally, ' … the refusal of a wife to have connection with her husband is held not to constitute a grave and sudden provocation' (see *Ratanlal & Dhirajlal*, at p 1332).

[98] As for the effect of the supposed words of Rozita at the bottom of the stairs 'sekarang kita bukan suami isteri lagi, kita cuma sebagai kawan sahaja', according to the accused, it caused him to feel that he had lost his mind and or memory (Perasaan saya macam hilang fikiran, dan hilang ingatan), to be confused in his thinking and to lose his mind (Fikiran saya bingung dan hilang ingatan). The accused understood those words to mean that the marriage was over (Saya tidak setuju dengan apa yang dikata oleh Rozita, sebab Rozita masih isteri saya. Saya faham kata Rozita sebagai tiada hubungan lagi), which fact he did not accept (Perasaan saya macam hilang fikiran, dan hilangan ingatan. Saya tidak terima hakikat kata Rozita kerana dia masih isteri saya). The accused said that he further felt as follows: 'Semasa saya dengar Rozita kata kita bukan suami isteri lagi, sebagai suami saya rasa dayus kerana saya

mampu lagi kasi nafkah batin, saya bukan ada penyakit yang tak boleh diubati, dan saya bukan mati pucuk. Semasa Rozita kata bukan suami isteri lagi, air muka Rozita marah. Perasaan saya sedih dan terus marah'.

[99] To sum up, those supposed words of Rozita at the bottom of the stairs stirred the accused to feel sad and then angry, to feel cheated, and to well up strong emotions and feelings. But the act of the accused could not be judged on his subjective emotions and feelings. The test is objective. 'The test to be applied is that of the effect of the provocation on a reasonable man, so that an unusually excitable pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did' (*Mancini v Director of Public Prosecutions* [1941] 3 All ER 272 per Viscount Simon). 'The test to be applied in order to determine whether homicide which would otherwise be murder is manslaughter by reason of provocation, is whether the provocation was sufficient to deprive a reasonable man of his self-control, not whether it was sufficient to deprive the particular person charged with murder (eg a person afflicted with defective control and want of mental balance) of his self-control. The provocation must be such as will upset, not merely a hot-tempered or hypersensitive person but one of ordinary sense and calmness.' (*Ratanlal & Dhirajlal*, at p 1337). Unfortunately, it could not be seen how a reasonable man or an ordinary man belonging to the same class of society as the accused would have been so provoked by any of the acts and words of Rozita, or by the entire sum thereof, to act as the accused did. There was nothing in the words or acts of Rozita that would have deprived a reasonable man of his self-control to the degree that reason would cease to hold dominion. There was nothing so grave that would have moved a reasonable man to violent and ungovernable passion. At the end of the day, all that Rozita said and did was to state her wish and make her stand that the marriage was over, notwithstanding the opposition of the accused. A reasonable man in the shoes of the accused who said he loved Rozita could have found the conduct of Rozita most unacceptable and unpalatable but yet would not have lost his self-control as a result of such 'provocation'. A reasonable man would have recognised that it was no more than a serious matrimonial difference. A reasonable man, no matter how disconcerted, distressed or dejected by the prospect of the break up of his marriage, would not have been so provoked as to kill. On the facts and circumstances, there was no grave and sudden provocation that would have destroyed the capacity for reasoning and inspired the intention in a reasonable man to kill. Learned counsel submitted that the accused had lost his mind. With respect, the accused had lost his head. Whatever the case, the retaliation was totally out of proportion to the aggravation. In all fairness, the accused could have had his reason to be angry with Rozita, but the denial of conjugal rights was no reason to kill.

[100] Exception 1 was not proved. Doubt was not cast. On the contrary, the offence had been proved beyond all reasonable doubt. There is no doubt whatsoever that the accused murdered Rozita. All evaluation of the evidence produced only that result. Accordingly, the accused is convicted on the charge and sentenced to hang by the neck till he is dead.

Accused convicted as charged and sentenced to death.

Reported by Andrew Christopher Simon